

2001

State of Utah v. Tracy Michal Allred : Brief of Appellee

Utah Court of Appeals

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IN THE UTAH COURT OF APPEALS

STATE OF UTAH,	:	
Plaintiff/Appellee,	:	Case No. 20010113-CA
v.	:	
TRACY MICHAL ALLRED,	:	Priority No. 2
Defendant/Appellant.	:	

AMENDED BRIEF OF APPELLEE

* * *

**APPEAL FROM A JURY CONVICTION FOR
POSSESSION OF MARIJUANA WITH INTENT TO
DISTRIBUTE IN A PUBLIC PARK, A SECOND
DEGREE FELONY, IN VIOLATION OF UTAH CODE
ANN. § 58-37-8(1)(a)(iii), (4) (Supp. 2000), IN THE
THIRD JUDICIAL DISTRICT COURT, SALT LAKE
COUNTY, UTAH, THE HONORABLE LESLIE A.
LEWIS, PRESIDING**

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**File
Clerk**

Court

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IN THE UTAH COURT OF APPEALS

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AMENDED BRIEF OF APPELLEE

* * *

JURISDICTION AND NATURE OF PROCEEDINGS

This is an appeal from a jury conviction for possession of marijuana with intent to distribute in a public park, an enhanced second degree felony, under UTAH CODE ANN. §§ 58-37-8(1)(a)(iii), (4) (Supp. 2000) (R3-5, 148). This Court has jurisdiction over the appeal under UTAH CODE ANN. § 78-2a-3(2)(e) (1996).

STATEMENT OF THE ISSUES AND STANDARDS OF REVIEW

1. Did the trial court properly determine that defendant voluntarily admitted that the black bag containing marijuana was his?

A bifurcated standard of review applies to this question. *State v. Rettenberger*, 1999 UT 80, ¶ 10, 984 P.2d 1009 (citing *State v. Mabe*, 864 P.2d 890, 892 (Utah 1993)). The ultimate determination of voluntariness is a legal question reviewed for correctness, while the trial court's factual findings are set aside only if they are clearly erroneous. *Id.*

2. Did the trial court properly exercise its discretion to deny defendant's motion for mistrial?

A trial court's denial of a mistrial motion will not be reversed "[u]nless a review of the record shows that the court's decision is plainly wrong in that the incident so likely influenced the jury that the defendant cannot be said to have had a fair trial, [the reviewing court] will not find the court's decision was an abuse of discretion." ***State v. Robertson***, 932 P.2d 1219, 1230 (Utah 1997). This deferential review is due to the "advantaged position of the trial judge to determine the impact of events occurring in the courtroom on the total proceedings[.]" *Id.* See also ***State v. DeCorso***, 1999 UT 57, ¶ 38, 993 P.2d 837 (reiterating ***Robertson*** standard).

3. Did the trial court properly exclude, as unreliable hearsay, evidence that a defense witness heard another individual claim ownership of the black bag in an alleged excited utterance, approximately one and one-half hours after defendant's confession and arrest?

"The standard of review when considering the admissibility of out-of-court statements under the Utah Rules of Evidence depends on whether the trial court's analysis involves a factual or legal determination or some combination thereof." ***State v. Parker***, 2000 UT 51, ¶ 13, 4 P.3d 778. Factual findings as to the nature, timing and reliability of the statements are reviewed for clear error. *Id.* The trial court's ultimate determination of admissibility is reviewed for abuse of discretion. See ***West Valley City***

v. *Hutto*, 2000 UT App 188, ¶ 9, 5 P.3d 1 (citing *State v. Pena*, 869 P.2d 932, 938 (Utah 1994), for abuse of discretion standard). *But see Salt Lake City v. Alires*, 2000 UT App 244, ¶ 8, 9 P.3d 769 (citing *Pena* but applying correctness standard).

CONSTITUTIONAL PROVISIONS, STATUTES, RULES

U.S. CONST. Amend. V:

No person shall . . . be compelled in any criminal case to be a witness against himself[.]

Utah R. Evid. 803(2):

The following are not excluded by the hearsay rule, even though the declarant is available as a witness: . . . *Excited Utterance*. A statement relating to a startling event or condition made while the declarant was under the stress of excitement caused by the event or condition.

STATEMENT OF THE CASE

Charge. Defendant was charged with possession of marijuana with intent to distribute in a public park, an enhanced second degree felony (R3-5).

Motion to Suppress Admissions. Defendant moved to suppress his pre- and post-*Miranda* admissions, claiming that he was coerced to confess when he overheard police conversing about bringing “a mean dog that bites people” to the scene¹ (R33). In lieu of a full hearing on the motion to suppress, both parties relied on testimony given at the preliminary hearing and only one witness was called to testify (*see* R188:3, 16-17-18, 20-

¹*See Miranda v. Arizona*, 384 U.S. 436 (1966).

45) (a copy of suppression hearing transcript (R188) is contained in **addendum A**, and a copy of the preliminary hearing transcript (R201), is contained in **addendum B**).²

Ruling. The trial court ruled from the bench that defendant's pre-*Miranda* confession was inadmissible, but took under advisement the admissibility of defendant's later warned confession (R188:39-45), **add. A**. Thereafter, the trial reaffirmed its ruling that defendant's initial pre-*Miranda* confession was inadmissible:

. . . I will just indicate the proposed ruling that the defendant's first statement was obtained in violation and that I would keep it out I'm going to adhere to. I'm not going to allow in the first statement. However, I am going to find that that statement, although in violation of *Miranda*, because the defendant quite simply had not been *Mirandized*, was a voluntary statement, wasn't coerced. It wasn't in any way forced. The defendant, who's a very pleasant gentleman, did not register any vehement complaints. The dogs were not there. So I find that that statement was voluntary and there's no constitutional violation. Therefore, the tainted fruit doctrine does not apply or create problems in connection with the second statement

(R189:1-2) (a copy of the oral ruling is contained in **addendum C**). Turning to defendant's post-*Miranda* confession, the trial court ruled that it was admissible (R189:2-4), **add. C**. The trial court specifically ruled "that a simple failure to administer the [*Miranda*] warning unaccompanied by any actual coercion . . ." did not "so taint[] the investigatory process that a subsequent voluntary and informed waived is ineffective"

²Although the transcript itself reflects a date of 1 September 2001 (*see* R188), the corresponding minute entry reflects that the hearing was held on 5 September 2001 (*see* R41-42).

(R189:2), **add. C.** Further, the trial court found “that the police officers comments about the mean dog [did] not rise to the level of coercion,” but were rather,

inane and ridiculous, although highly improper, and they did not in any way, to this Court’s mind, and I base this upon statements of the witness and also the totality of the facts and circumstances, I find that they did not in any way overcome the defendant’s free will and since the Court finds an absence of coercion or other improper tactics, suppression of the second statement is denied and will be allowed.

I also will talk at some point with counsel present to law enforcement about the stupidity, if you will, of their approach in bringing a dog to the scene and their ridiculous statement about the dog. But to my mind, the statement was not the result of the dog, and the mere fact that he was in a vehicle at the scene at some point, although it’s not clear whether that was at a, same time that the statement was made, does not to my mind change anything, and the mere fact that *Miranda* was not given during the first statement does not taint that statement for the reasons given and both of the cases to which I eluded find the same thing.

(R189:3), **add. C.** The trial court’s written findings and conclusions were filed after trial on 15 February 2001 (R172-178) (a copy is contained in **addendum D**).

Trial. Following a one-day jury trial on 12 September 2000, defendant was convicted as charged (R148).

Sentence. On 5 January 2001, the trial court imposed the statutory term of one-to-fifteen-years, with credit for time served (R156-157).

Notice of Appeal. Defendant filed a timely notice of appeal (R159).

STATEMENT OF THE FACTS³

Officers Dimond and Evans were patrolling Liberty Park looking for drug activity on the evening of 9 June 2000, when they made contact with defendant and five other individuals sitting on a picnic table near the basketball court (R190:125-127) (*see also* (R188:4-7), **add. A**, and (R201:2-3, 13-15), **add. B**). As the officers approached the group at the picnic table, defendant “made a quick movement down towards his pocket and then turned and sat down on the table facing away ‘from the officers’” (R190:128, 162) (*see also* (R201:4, 18-19), **add. B**).⁴ Officer Evans asked the group “how they were doing, told them about the problems that [he] had experienced in, around in [that] area of the park, that’s particularly the basketball courts,” and asked the group if they had observed any drug activity in the area (R190:130, 163) (*see also* (R188:7, 10), **add. A**). All six responded negatively (R190:130) (*see also* (R188:11), **add. A**). The officers then asked for identification from the group and ran warrants checks (*id.*) (*see also* R201:21-22), **add. B**). Finding no warrants, the officers did not plan to detain anyone (R190:131) (*see also* R 201:5, 23), **add. B**).

³The facts are recited in the light most favorable to the trial court’s pre-trial admissibility ruling and to the jury verdict. *See State v. Daniels*, 2002 UT 2, ¶ 2, 40 P.3d 611 (jury verdict); *State v. Tetmeyer*, 947 P.2d 1157, 1158 (Utah App. 1997) (admissibility ruling).

⁴Although not elicited at trial, Officer Evans frisked defendant to make sure that the item he had put in his pocket was not a weapon (R201:20), **add. B**. No weapon or other evidence was found (*id.*).

As the officers made ready to leave the area, they observed a black bag sitting by the end of the bench, with no one sitting near it (R190:131, 164) (*see also* R188:8-9), **add. A**, (R201:5-6, 23), **add. B**). None of the six individuals claimed the bag, nor did anyone else in the immediate vicinity (R190:132, 164) (*see also* (R188:11), **add. A**, (R201:7, 24-25), **add. B**). When the officers looked inside for some identification they saw “some car stereos,” a couple of baggies of marijuana, and approximately 82 empty baggies, sandwich size and smaller, one-inch square size (R190:132, 164-165) (*see also* (R188:11), **add. A**, (R201:7), **add. B**). The officers took each of the six individuals aside individually and asked them again if the bag belonged to any one of them (R190:146, 166, 177). All six again denied knowing anything about the black bag (R190:166, 178) (*see also* R188:12), **add. A**).

At this juncture the officers conferred with one another, in front of the group of six, as to the advisability of bringing a drug dog to the scene, and which type (R190:147) (*see also* (R188:13-14), **add. A**, (R201:29-30), **add. B**). Specifically, there are two types of police dogs: Canines (German Shepherds) and Bloodhounds (R190:154). The German Shepherds are used for tracking and for sniffing drugs and “can be used to apprehend suspects if a person runs” (*id.*). They are also “sometimes mean” (R190:179). The officers discussed that a German Shepherd had once “nipped” someone’s backside because he had drugs stuffed there (R190:180). “[T]hey’re trained to play with drugs as a toy and they think it’s a toy and so when they locate . . . a drug they kind of start

playing with it like it's toy, and that's how they indicate there's a drug there"

(R190:179). Neither officer said that the dog would bite any of the individuals being questioned (R201:33), **add. B**.

Because Officer Dimond was concerned about bringing a German Shepherd to the scene because "there's a possibility that they could get bit," the officers determined to bring the Bloodhound instead (R190:148, 154-155). The Bloodhound is "fairly new to [the] police department," and "is a very friendly dog. It's a big Bloodhound like McGraw, and it's used to track. It can sniff people. You just give it a small article of clothing and it can sniff exactly where that person's been, based on just that one smell, and so it's used only to find people or, or things" (R190:154).

Following this discussion between the officers, but prior to the Bloodhound's arrival, defendant volunteered that the black bag containing marijuana belonged to him (R190:155, 180) (*see also* (R188:14), **add. A**, (R201:30), **add. B**). Because the trial court had ruled pretrial that defendant's pre-*Miranda* confession was not admissible, the prosecutor asked broadly whether "at some point" the officers had occasion to arrest defendant (R190:167). Officer Evans responded affirmatively and indicated that after arresting defendant, he "told him he wanted to ask a few questions, and asked defendant if he had ever been read his *Miranda* rights (*id.*). When defendant responded affirmatively, the officer asked if he understood those rights and defendant responded affirmatively (*id.*). Thereafter, Officer Evans explained the *Miranda* rights to defendant

and defendant agreed to talk (*id.*). Specifically, defendant said that the black bag and marijuana belonged to him, “that he had been selling marijuana for approximately two months in the park”(R190:168).

In obtaining defendant’s confession, Officer Evan’s at no time removed his gun from his duty belt (R190:169). Moreover, defendant gave no indication that he was fearful about the Bloodhound, which, in any event, was never let out of the police vehicle in which it arrived (R190:170).

Defendant called one witness, Sonya Ortiz, who was one of the six people present at the picnic table at the time of his arrest (R190:271-304). According to Ortiz, another individual, known to her only as “Clay,” was present at the picnic table when the police initially approached, but immediately left the area (R190:276, 281, 288). Clay returned to the picnic table about one and one-half hours after defendant’s arrest (R191:281, 286). According to Ortiz, Clay was “angry,” specifically, he was “yelling and swearing” (R190:282, 287). Upon objection from the prosecutor, the trial court precluded Ortiz from testifying that Clay stated, “The bag was mine. That stuff was mine” (R190:296).

SUMMARY OF THE ARGUMENT

Point I. Defendant’s reliance on trial evidence and information in his sentencing diagnostic evaluation to challenge the trial court’s pretrial ruling admitting his confession is misplaced. Indeed, evidence and information adduced *after* the pretrial ruling cannot be used as a basis for reversing it. Moreover, defendant’s reliance on trial evidence and

sentencing information highlight his failures to (a) preserve any claim that he was unusually susceptible to the officers' dog discussion, and to (b) marshal the evidence or to show clear error in the trial court's pretrial ruling and supportive findings.

In any event, the trial court carefully evaluated the totality of the circumstances surrounding defendant's admission and rejected defendant's claim that the officers implicitly threatened that a dog would bite him if he did not confess that the marijuana was his. The trial court's ruling is well-supported in the record and should be upheld.

Point II. The trial court properly exercised its discretion to deny defendant's motion for mistrial. Even if the prosecutor elicited testimony in violation of the pretrial stipulation, any error in its admission was harmless because defendant was not charged with stealing stereos, and the jury was not told of his admission regarding the stolen stereos. Thus, given the incriminating evidence that defendant claimed the marijuana in the bag and admitted selling it, a reasonable jury would have convicted him for the drug crime with or without the innocuous references to the stereos.

Second, any possible prejudice resulting from Officer Evans's reference to a prior administration of ***Miranda*** rights was cured by the trial court's neutral explanation for the reference. This Court generally presumes that a jury will follow the instructions given it. Defendant does not claim and the record does not indicate that the trial court's curative instruction was ineffective.

Point III. The trial court properly excluded, as unreliable hearsay, evidence that a defense witness overheard another essentially unknown individual claim the black bag approximately one and one-half hours after defendant's confession and arrest. The alleged declarant's "discovery" that the bag he allegedly earlier abandoned was missing does not amount to the type of shocking or frightening event classically associated with the excited utterance exception to the hearsay rule. Rather, the circumstances of this case suggest that the declarant, if he existed at all, reasonably anticipated that police would seize the abandoned bag and the contraband therein. Even if the exclusion was erroneous, it was harmless in light of defendant's weightier confession that the bag and the marijuana belonged to him.

ARGUMENT

POINT I

THE TRIAL COURT PROPERLY DETERMINED THAT, UNDER THE TOTALITY OF THE CIRCUMSTANCES, DEFENDANT VOLUNTARILY ADMITTED THE BLACK BAG CONTAINING MARIJUANA WAS HIS

"A confession, if freely and voluntarily made, is evidence of the most satisfactory character." *Hopt v. Territory of Utah*, 110 U.S. 575, 584 (1884). "[F]ar from being prohibited by the Constitution, admissions of guilt by wrongdoers, if not coerced, are inherently desirable." *State v. Piansakone*, 954 P.2d 861, 865 (Utah 1997) (quoting *Oregon v. Elstad*, 470 U.S. 298, 305 (1985)). Indeed, "[a]dmissions of guilt are more than merely 'desirable,' they are essential to society's compelling interest in finding,

convicting, and punishing those who violate the law.” *Moran v. Burbine*, 475 U.S. 412, 426 (1986) (citations omitted).

Defendant claims he was coerced to claim the bag containing marijuana in violation of the federal constitution when he overheard police discuss the possibility of bringing a mean drug detection dog to the scene.⁵ Aplt. Br. at 14, 23-26. The trial court properly rejected defendant’s claim of coercion (R172-178), **add. D**.

Proceedings Below. In lieu of a full evidentiary hearing on defendant’s motion to suppress, the parties opted to rely primarily on the preliminary hearing transcript (R188:3), **add. A**. Accordingly, only one witness, Sonya Ortiz, testified at the abbreviated suppression hearing (R188:3-15), **add. A**. Thereafter, the parties argued to the trial court, relying on evidence adduced at the preliminary hearing, which the trial court had previously reviewed (R188:3, 16-18, 20-40), **add. A**. The trial court’s factual findings, from the point of the officers’ conversation about the drug dog until the

⁵Defendant also claims that the admission of his post-*Miranda* confession violated the state constitution. Aplt. Br. at 14, 20 n.19, 26-37. For this Court to consider defendant’s state constitutional claim on appeal, defendant must have fully argued it below. *See State v. Bobo*, 803 P.2d 1268, 1272-1273 (Utah App. 1990) (holding trial court is proper forum in which to commence “thoughtful and probing analysis” of state constitutional interpretation). Defendant’s nominal reference to the state constitution in his motion to suppress below (*see* R32), is inadequate to preserve the issue for consideration on appeal. *Id. See also In re N.R., L.R., and C.R.*, 967 P.2d 951, 954 n.3 (Utah App. 1998) (declining to reach state constitutional argument where appellants “failed to adequately raise their Utah constitutional challenge at trial”); *State v. McGrath*, 928 P.2d 1033, 1039 n.2 (Utah App. 1996) (holding that “[d]efendant’s nominal references to the Utah Constitution below lacked the groundwork for ‘thoughtful and probing analysis’ of this issue in the trial court”) (citation omitted)).

conclusion of the Liberty Park encounter, are reproduced here with supporting citation to the preliminary hearing (*see* R201), **add. B**, and suppression hearing transcripts (*see* R188), **add. A**:

34. After each of the six people asked denied knowing to whom the [marijuana] bag belonged, the officers engaged in a conversation between themselves about different ways in which they might determine the bag's owner [(R201:29-30), **add. B**, (R188:13-14), **add. A**].
35. During that conversation, conducted within earshot of all six people, the officers considered aloud whether they should call in a K-9 unit [*(id.)*].
36. As a part of the discussion about the possibility of a K-9 unit, one of the officers made a comment about some of the police dogs being meaner than others [(R201:29-30), **add. B**].
37. Officer Evans remarked that Salt Lake County had a dog that had nipped at a suspect's backside because the dog had alerted on drugs located in the suspect's pants [(R201:30), **add. B**].
38. The officers never indicated to any person that a dog would bite them if they turned out to be the owner of the bag [(R201:33), **add. B**].
39. There was not a police dog present at the scene during the conversation about the dog [(R201:31, 33, 35), **add. B**, (R188:14), **add. A**].
40. Defendant then indicated to Officer Dimond that the bag belonged to him [(R201:30), **add. B**].
41. Defendant was then placed under arrest, and Officer Evans read defendant his *Miranda* rights [(R201:32), **add. B**].
42. Post-*Miranda*, defendant described to Officer Evans the contents of the bag, and the origin of those items. He indicated, among other things, that the green leafy substance inside the bag was marijuana and that he had been selling marijuana because he could not get a job [(R201:9-10, 30), **add. B**].

43. Sometime around the time that defendant was arrested, Officer Serio arrived at the scene with a police dog [(R201:31-35), **add. B**].
44. Officer Serio was driving a marked Salt Lake City Police car that did not bear any marking identifying it as a K-9 unit [(*id.*)].

(R172-177), **add. D**.

Based on the above, the trial court concluded that defendant's initial admission was made without benefit of *Miranda* warnings and was inadmissible on that ground (R177), **add. D**. However, because defendant's initial admission was otherwise voluntary, it did not taint his subsequent post-*Miranda* confession (*id.*). The trial court thus deemed defendant's post-*Miranda* confession admissible under *Oregon v. Elstad*, 470 U.S. 298 (1985), and *State v. Troyer*, 910 P.2d 1182 (Utah 1995): "[A]lthough defendant's initial statement was made without benefit of *Miranda* warnings, it was unaccompanied by actual coercion. Therefore, the absence of *Miranda* prior to the initial statement does not sufficiently taint the investigatory process so as to render ineffective the subsequent waiver" (R178), **add. D**.⁶

Analysis. Defendant pins his claim of coercion on the fact that he admitted the marijuana bag was his only after "the officers threatened to bring a fierce dog to the scene." Aplt. Br. at 24. In support, defendant argues that police "admit to bandying talk

⁶In denying defendant's related motion to dismiss for insufficient evidence at the close of the State's case, the trial court *sua sponte* reaffirmed its pretrial ruling admitting defendant's warned confession and observed "it's even clearer after hearing the evidence that there was an absence of coercion in his statement" (*see* R191:267-269). Defendant does not challenge on appeal the trial court's denial of his motion to dismiss.

of bringing a fierce dog, who had previously bitten a suspect, to the scene.” Apl’t. Br. at 25. Defendant thus claims that he confessed to owning the black bag “to avoid confrontation with the dog[.]” *Id.* Contrary to defendant’s suggestion, his and his five acquaintances’ encounter with police in Liberty Park is “a far cry from cases in which a Fifth Amendment violation was held to have occurred.” *Troyer*, 910 P.2d at 1188 (collecting cases).

“Cases that implicate the Fifth Amendment must, by definition, involve an element of coercion, since the Fifth Amendment protects individuals from being *compelled* to give evidence against themselves.” *Troyer*, 910 P.2d at 1188 (emphasis added). “[A] statement is not involuntary, in violation of due process rights, unless it has been obtained by coercive police activity.” *Id.* (citing *Colorado v. Connelly*, 479 U.S. 157, 167 (1986)). *Accord Nickel v. Hannigan*, 97 F.3d 403, 410 (10th Cir. 1996), *cert. denied*, 520 U.S. 1106 (1997). Thus, “the evidence must show that the coercive tactics of the police overcame the defendant’s free will.” *State v. Galli*, 967 P.2d 930, 935 (Utah 1998) (citing *State v. Mabe*, 864 P.2d 890, 893 (Utah 1993)). Examples of Fifth Amendment coercion range “from classical third-degree torture, to prolonged isolation from family or friends in a hostile setting, or to a simple desire on the part of a physically or mentally exhausted suspect to have a seemingly endless interrogation end, all might be sufficient to cause a defendant to accuse himself falsely.” *Troyer*, 910 P.2d at 1188 (quoting *Michigan v. Tucker*, 417 U.S. 433, 444 (1974)). In other words, Fifth

Amendment coercion constitutes “severe pressure[] which may override a particular suspect’s insistence on innocence.” *Id.*

“To determine whether a suspect’s statements were coerced, courts look to the totality of the circumstances.” *Troyer*, 910 P.2d at 1188 (citing *Withrow v. Williams*, 507 U.S. 680, 693 (1993)). Relevant factors include “the crucial element of police coercion,” the length and location of the interrogation, use of physical punishment such as the deprivation of food or sleep, whether defendant was advised of his *Miranda* rights, and defendant’s maturity, education, physical condition, and mental health. *Id.* (citing *Withrow*); *Schneckloth v. Bustamonte*, 412 U.S. 223, 226 (1973).

Here, defendant does not and could not, claim that the encounter was unduly lengthy, that the public park location was hostile, or that he was deprived of food or sleep prior to confessing. *See* Aplt. Br. at 23-26. Rather, defendant cites the results of his diagnostic evaluation at sentencing to suggest that he was more susceptible to the officers’ dog conversation than the other five suspects being questioned about the marijuana. Aplt. Br. at 26, n.26. While defendant admits that the trial court did not have the benefit of the diagnostic evaluation at the time of its pretrial ruling, he nonetheless suggests that the diagnostic evaluation should be considered by this Court for the first time on appeal under the totality of circumstances rubric. Aplt. Br. at 26, n.26.

A. Defendant Cannot Rely on Trial Evidence and a Post-Trial Diagnostic Evaluation to Challenge the Trial Court's Pretrial Admissibility Ruling.

There are three reasons why defendant's attempt to rely on the results of his post-trial diagnostic evaluation (and other evidence adduced *after* the trial court's pretrial admissibility ruling), to support of his claim of coercion must fail.⁷ First, most appellate courts (Utah has no rule), in reviewing the denial of a pretrial motion to suppress evidence, will only consider evidence before the court at the suppression hearing. *See, e.g., United States v. McRae*, 156 F.3d 708, 711 (6th Cir. 1998); *United States v. Hicks*, 978 F.2d 722, 724-725 (D.C. Cir. 1992); *Baez v. State*, 425 S.E.2d 885, 890 (Ga.App.1992); *State v. Ryder*, 315 N.W.2d 786, 788-789 (Iowa 1982); *Aiken v. State*, 647 A.2d 1229, 1232 (Md. App. 1994), *cert. denied*, 651 A.2d 854 (Md. 1995); *Commonwealth v. Powers*, 398 A.2d 1013, 1014 (Pa. 1979); 4 Wayne R. LaFave, *Search and Seizure* § 11.1(b) (1996 & Supp. 2002). Some appellate courts will consider both pretrial and trial evidence in reviewing a pretrial ruling; however, courts endorsing this rule generally do so in the context of *affirming* the trial court's pretrial ruling. *United States v. Muniz*, 1 F.3d 1018, 1021-1022 (10th Cir.), *cert. denied*, 510 U.S.1002 (1993); *United States v. Martin*, 982 F.2d 1236, 1239-1240 n.2 (8th Cir. 1993); *United States v. Basey*, 816 F.2d 980, 983 n.1 (5th Cir. 1987); *State v. Young*, 576 So.2d 1048, 1054 n.1 1055 (La. Ct. App. 1991); *State v. Duncan*, 879 S.W.2d 749, 751 (Mo. Ct. App. 1994).

⁷Defendant challenge to the trial court's pretrial admissibility ruling includes citations to evidence adduced at trial, and the previously referenced sentencing diagnostic evaluation. *See, e.g.,* Aplt. Br. at 14-15, 24-26, n.26.

Contra State v. Kong, 883 P.2d 686, 688 (Hawaii Ct. App. 1994) (reversal). The principle unifying these cases is that an appellate court may affirm, but will not reverse, a ruling based on evidence not before the district court at the time it ruled. The State is aware of no jurisdiction following the rule that an appellate court may reverse a pretrial ruling based *only* on evidence presented at trial or sentencing without considering evidence presented at the pretrial hearing.

Thus, this Court should not consider evidence and information adduced following the trial court's pretrial admissibility ruling. However, in the event the Court does consider subsequently adduced trial evidence, it should do so in the context of affirming the trial court's pretrial ruling.

B. Below, Defendant Claimed That He Was Coerced by the Officers' Implicit Threat "That He Would Likely Be Bitten By a Mean Dog if He Did Not Confess"; On Appeal, Defendant Claims That the Results of His Sentencing Diagnostic Evaluation Demonstrate He Was Unusually Susceptible to the Officers' Dog Discussion.

Second, not only was the sentencing diagnostic evaluation unavailable to the trial court at the time of the pretrial ruling, defendant did not otherwise raise any issue as to his unique susceptibility or maturity, education and mental health, as compared to the other non-confessing suspects, below (*see* (R32-34) and (R188:14-33), **add. B**). Rather, defendant asserted that the officers implicitly threatened that he would "likely be bitten by a mean dog if he did not confess" (R34). While defendant called Sonya Ortiz to testify regarding the Liberty Park encounter with police, he did not himself take the stand (*see* R188:3-17), **add. B**. Accordingly, defendant's suggestion, raised for the first time

on appeal, that he was unusually susceptible to the officers' dog discussion due to his I.Q., reading level, and mental health, *see* Aplt. Br. at 26 n.26, is unpreserved. "Trial counsel must state clearly and specifically all grounds for objection." *State v. Bryant*, 965 P.2d 539, 546 (Utah App. 1998) (quoting *State v. Larsen*, 865 P.2d 1355, 1363 n.12 (Utah 1993)). Indeed, "[t]he objection must "be specific enough to give the trial court notice of the very error' of which counsel complains." *Bryant*, 965 P.2d at 546 (quoting *Tolman v. Winchester Hills Water Co.*, 912 P.2d 457, 460 (Utah App. 1996) (citations omitted)). Because defendant argues no exception to the preservation rule, his claim of unusual susceptibility is waived. *State v. Pledger*, 896 P.2d 1226, 1229 n.5 (Utah 1995).

C. Defendant's Reliance on Trial Evidence and a Post-Trial Diagnostic Evaluation Highlight His Failure to Marshal the Evidence or to Show Clear Error in the Trial Court's Findings.

Third, defendant's reliance on trial evidence and his post-trial diagnostic evaluation to support his claim of coercion (*see, e.g.*, Aplt. Br. at 24-26, n.26), only highlights his failure to marshal the evidence actually before the trial court, or to demonstrate any clear error in the trial court's pretrial admissibility ruling. Indeed, defendant argues or assumes that the officers' dog discussion was coercive, but wholly ignores the trial court's contrary findings supporting its admissibility ruling. *See* Aplt. Br. at 24-26. As noted previously, the trial court specifically found that

- the officers discussed between themselves the temperaments of the available police dogs, with one of the officers commenting that one of the dogs was meaner than other, and had "nipped" at another suspects backside; however,

- the officers' never threatened the six suspects at the picnic table that a dog would bite them if one of them turned out to be the owner of the marijuana bag,
- no police dog was present during the officers' discussion, and
- the unmarked K-9 unit arrived *after* defendant's initial unwarned admission, sometime during his subsequent arrest

(*see* R176-177), **add. D.** In ignoring these findings, defendant necessarily fails to demonstrate any clear error therein.

When challenging the findings of fact of the trial court on appeal, the appellant must show that the findings of fact were clearly erroneous. In order to show clear error, the appellant must marshal all of the evidence in support of the trial court's findings of fact and then demonstrate that the evidence, including all reasonable inferences drawn therefrom, is insufficient to support the findings against an attack.

State v. Moosman, 794 P.2d 475 (Utah 1990). *See also* Utah R. App. P. 24(a)(9) ("A party challenging a fact finding must first marshal all record evidence that supports the challenged finding."). If, as here, the appellant makes no attempt to marshal the evidence supporting the trial court's ruling and to demonstrate its insufficiency, the appellate court "accepts the trial court's findings as stated in its ruling." *State v. Benvenuto*, 1999 UT 60, at ¶ 13, 983 P.2d 556. *See also Crookston v. Fire Ins. Exch.*, 817 P.2d 789, 800 (Utah 1991 (failure to marshal evidence). Defendant's failure to marshal is alone grounds to reject his claim of coercion. *State v. Widdison*, 2001 UT 60, ¶ 61, 28 P.3d 1278; *State v. Mincy*, 838 P.2d 648, 652 n.1 (Utah 1992), *cert. denied*, 843 P.2d 1042 (Utah 1992).

D. Defendant's Claim of Coercion Lacks Merit.

In any event, defendant's claim of coercion lacks merit. Defendant's claim hinges on the fact that he overheard the officers discuss which of two dogs, a German Shepherd and a Bloodhound, to bring to the scene. Aplt. Br. at 24-26. The officers discussed two different police dogs, with two different temperaments, and opted for the friendlier of the two, the Bloodhound (*see* (R188:13-14), **add. A**, (R201:29-30, 33), **add. B**, (R190:147-148, 154-155, 179-180)). As found by the trial court, this conversation was no more directed to defendant than to any of the other five suspects at the picnic table—yet, none of the others felt compelled to claim the marijuana bag in order to avoid confrontation with the dog (*see* R177), **add. D**. Indeed, Sonya Ortiz recalled the officers' discussion, but did not indicate that it alarmed her in any way (R188:13-14), **add. B**, (R189:3), **add. C**. Given these circumstances, and the trial court's undisputed findings referenced above (*see* R176-177), **add. D**, the trial court's ultimate conclusion that the officers' dog discussion did not coerce defendant to claim the marijuana bag is well supported (R177-178), **add. D**.

Additionally, the trial court correctly observed that a non-coercive *Miranda* violation does not taint a subsequent warned confession (R177-178), **add D**. *See Elstad*, 470 U.S. at 305, 308; *Troyer*, 910 P.2d at 1189. Thus, even though defendant's initial unwarned statement was arguably elicited in violation of *Miranda*, it does not taint defendant's later warned confession. *Id.*

In sum, the trial court carefully considered the totality of the circumstances regarding defendant's Liberty Park confession in ruling that neither defendant's pre- nor his post-*Miranda* admissions were coerced. The trial court's ruling that defendant's warned confession was therefore voluntary and admissible is sound and should be upheld.

POINT II

THE TRIAL COURT PROPERLY EXERCISED ITS DISCRETION TO DENY DEFENDANT'S MOTION FOR MISTRIAL

A. Clarification of Proceedings Below.

Pretrial Stipulation. Prior to the beginning of trial on 11 September 2000, the parties stipulated that Officers Dimond and Evans would not testify as to the statements defendant made with respect to the origin of the car stereos found in defendant's bag along with the marijuana (R1190:14-15, R190:230-231) (copies of the pertinent transcript pages are contained in **addendum E**). Trial counsel stated the stipulation as follows:

Your Honor, there is one matter that I think we need to put on the record that [the prosecutor] and I have agreed to, but just so that the Court's aware of it. As the Court is I'm sure aware from our Motion hearing, the bag in question contained what appears to be marijuana and ultimately was tested to be, as well as some other property which included car stereos and face plates from stereos. It's my understanding that [the prosecutor] has instructed her witnesses - . . . - not to mention specifically what they are. I think what she's planning to do was simply ask them did [defendant] explain the other property or, but not go into what the property is or not go into what specifically what [defendant] said about the other property.

(R190:14-15), **add. E**.

Trial Testimony. Thereafter, the prosecutor elicited the following information from Officers Dimond and Evans without objection from trial counsel:

PROSECUTOR: When you looked in this black bag, initially what was the first thing you saw?

OFFICER DIMOND: There was, there was some car stereos inside the bag. There was a baggie of marijuana.

...

PROSECUTOR: Okay, when you looked in that bag what did you observe?

OFFICER EVANS: I observed a couple of stereos, couple, some tools. I observed a couple baggies with green leafy substance inside.

(R190:133, 165), **add. E.**

Additionally, Officer Evans' responded to the prosecutor's question about the first thing he did following defendant's arrest as follows:

OFFICER EVANS: After he'd been placed? I just told him I wanted to ask him a few questions and I asked him if he had ever been read his *Miranda* rights. He said yes.

PROSECUTOR: Okay.

OFFICER EVANS: I said do you understand those? He said yes. Then I went through and explained what his rights were and asked if he would like to talk to me.

(R190:167-168), **add. E.**

Following Officer Evans, the State called two more witnesses before concluding its case (R190:190, 203, 218).

Motion for Mistrial Based on Alleged Violation of Parties' Pretrial Stipulation.

Defendant first complained about a possible violation of the parties pretrial stipulation during an *in camera* conference with the trial court, after the State had rested (R190:224), **add. E.** Specifically, trial counsel moved for a mistrial, indicating it was her understanding that

the State's witnesses were not going to bring to the jury's attention the fact that there were car stereos in the bag, State's Exhibit 1, and it's my recollection that both Officer Dimond and Officer Evans did, in fact, mention those. Although they did not specify anything about [defendant's] statement in regard to those. I believe that's in violation of our stipulation and, further the stipulation in my view at least was based on the fact that that's an indication of some prior or other bad acts which I believe is prohibited by Rule 404 and that was my reason for speaking with [the prosecutor] about it.

Prosecutor's Response. The prosecutor responded that she understood the pretrial stipulation to be that she

would not ask the officers, nor would they testify about the statements [defendant] made with respect to the origin of the stuff in the bags, specifically the car stereos were stolen, and I didn't ask them that they didn't testify to that. I don't believe it was ever a part of the stipulation that we would ever hide what was in the bag or that we would not discuss the other items that were in the bag besides the marijuana.

My, my understanding of the stipulation was that I would not ask the officers and they would not testify as to [defendant's] statement that the stereos had been stolen.

(R190:230), **add. E.**

Ruling. The trial court agreed with the prosecutor's recollection of the parties' stipulation:

That was my understanding that there would be no lengthy discussion of the stereos, that what would occur would be a brief description of what was seen in the black bag, that there would be absolutely no inference or follow-up on the potential source of the stereos.

So, I'm going to deny the motion for mistrial on that, and in closing, the State may not allude to it. The defense, however, may allude to it. If there's some way that you think it can help you and you can clean it up because the best thing, the best possibility - and I remember this vividly--the stipulation, I should have on my own motion probably ruled that the stereo heads or whatever they were, were not even to be referenced as having been in the bag. But that was not the stipulation as I recall it. There was no reasons for it to be discussed and consequently, it would have been cleaner had it not been, but I see no violation in the stipulation.

(R190:230-231), **add. E.** The prosecutor then sought clarification from the trial court that she would be able to argue to the jury that defendant made comments to the officers indicating he knew what was in the bag which "is evidence of the fact that the bag was his" (R190:231-232), **add. E.** The trial court agreed so long as the prosecutor did not alluded to the stereos: "you may say that [defendant] made reference to what items were in the bag, described a few of the different things and by his description it was clear that he had seen the inner contents of the bag" (R190:232), **add. E.**

Motion for Mistrial Based on Officer Evan's Reference to Possible Prior Administration of Miranda Rights. At the same time defendant moved for a mistrial based on the "stereo" evidence, he also moved for a mistrial based on Officer Evans' reference to a possible prior administration of ***Miranda*** rights, to which defendant also initially raised no objection (R190:224-225), **add. E.**

Ruling. The trial court remarked that she had not even heard Officer Evans' testimony regarding the prior ***Miranda*** warning and noted that if she had missed it,

“perhaps the jury did as well” (R190:225-226), **add. E.** The prosecutor agreed that Officer Evans had so testified, but pointed out that defendant did not object, or move to strike (*id.*). The trial court agreed: “That’s true. There was not motion to strike, no ability to clarify it because of that -”(*id.*). Trial counsel said her non-objection was strategic: “I intentionally did not object because if I objected, that’s just going to bring it to the jury’s attention even more . . . I tactically decided to make a motion for mistrial based on the testimony rather than take the chance of bringing - . . . - further attention to it” (*id.*). The trial court indicated she understood the strategy, but also pointed out that

[the problem is that when you make that strategic determination and don’t raise the issue, and certainly you don’t raise it in front of the jury anyway, you say you need a brief recess and, in fact, we did take a recess around that time. You call it to my attention and there a number of ways in which it can be handled by my making some kind of curative statement. It is, however, an incredibly stupid thing to have said and I missed it, which the only good thing, because if I missed, perhaps the jury did as well.

(R190:226), **add. E.**

The trial court then had trial counsel restate the complained of *Miranda* testimony and trial counsel recalled that Officers Evans testified, “I asked [defendant] if he had been *Mirandized* before and he said yes and I said to him then you understand what it means-“ (*id.*). The trial court responded,

Okay, I don’t think then it’s the problem that I initially saw it to be. I know unfortunately what Officer Evans meant and you know what Officer Evans meant. But the jury has no way of knowing what Officer Evans meant and he could have meant were you *Mirandized* a few minutes ago. It does not necessarily allude to or reference another time and another crime. He doesn’t say were you *Mirandized* on another case. Have you ever been arrested before? Have you ever been charged with a crime before? He just

says have been *Mirandized* before - . . . - which could have been - . . . - in the last 15 minutes.

(R190:227), **add. E.** The trial court then offered to “make some kind of curative statement if you’d like me to[,]” and further stated she was “inclined to deny the motion for a mistrial” (*id.*).

Trial counsel initially declined the offered curative statement: “Your Honor, it would not be my request that the Court make any sort of curative statement. In my view, if any or all of the jurors did not notice that statement, then that would simply bring it to their attention and I’m concerned about that happening[.]” (*id.*). In response, the trial court gave an example of what the proposed curative statement would entail:

What about if I were merely to say at an appropriate point in time, incidentally we use a lot of words in court like preliminary hearings and *Miranda*, words that we in the legal system know the meaning of and you may not know the meaning of. Just so you understand *Miranda* are the rights that are given by a law enforcement officer, typically on a card, and they talk about you have the right to remain silent, etc., and it’s frequently a situation where one officer with another officer may do the *Mirandizing* and the other officer may not and they’ll check to see if one has, has given the *Miranda* rights to the defendant. It being generic like that does not misrepresent the facts. Because that is certainly something that happens where an officer will ask if a suspect has been *Mirandized* by his partner, or the other officer there.

I don’t know if that helps or hurts. But I offer it as a possible solution and I can give it in the context that broader description of some legal terms so that it doesn’t sound like we’re just pulling out on concept and one term and drawing attention to it and I’d be happy to do that

(R190:227-228), **add. E.** The trial court further emphasized that Officer Evans’ testimony had been “innocuous, did not imply a prior criminal record,” and that she would not

mis-try it and the main reason is that the manner in which it was stated does not imply to the average person listening any prior problems with the law. It is neutral in that respect. It certainly could connote the other to a sophisticated person in the legal environment and for that reason I wish the statement had not been made. But I think to the average lay person it does not have that connotation

(R190:234), **add. E.**

Following a recess and consultation with defendant, trial counsel urged the trial court to give the suggested curative statement:

[W]e would like to the Court to make a statement to the jurors such as you suggested before about the reading of rights and indicating that sometimes officers will check with a person and see if one officers have, have read the rights or not to, to have the information before they do that, or you put in a lot better that I did -

(R190:235), **add. E.** Thereafter, the trial court instructed the jury as follows:

All right, you may all be seated. . . . In [sic] occurred to me while I had you out there waiting and while counsel was visiting about a couple of the legal points that there are a lot of terms that we use when we do a trial and even though I'm sure all of you have degrees of college, we've got a very bright jury here, even so and even given that on t.v. now you hear a lot about the legal system. For some reason they find it more fascinating than those of us involved in it do. But even so, there are a lot of terms that are kind of alien or unknown to many lay people and I just wanted to allude to that.

Chain is one of those terms. Obviously, you know, if you have a chain around your wrist that's different than what was being discussed in here. Chain is a link from one person who has control of evidence to the next person who has control, and that's legal term that I just wanted to make sure you understood.

We've talked about burden of proof and I'll talk about that more in the instructions that I give you on the law, and proof beyond a reasonable doubt, which is the standard in any criminal case, and I'll define that at some length, because it's a concept that we grapple with and that is very important. So these are terms that you hear and hopefully you won't find them confusing.

We also referenced *Miranda* and I think most of you have probably heard about *Miranda*. It's been effect nor about 50 years actually. But *Miranda*, just so you know, is something that occurs frequently in an investigation when a police officer or police officers are talking to someone and they want to get information and they want to put the person on notice, as they should, that the person's statements may come back and may be used in court and that they have the right to a lawyer, etc., etc.

Now in this case there was a reference to *Miranda* which was given and an officer was not sure whether another officer had given it. The *Miranda* rights, now you know what we were referring to if you didn't before.

So as we go through the trial if I hear a term such as that, or it appears that there's something like chain that may not be clear in the manner of its usage, while it's an ordinary word, we may stop and just visit about that briefly as we just did, and in the instructions that I give you on the law there will be considerable help in terms of defining terms, the burden of proof, etc.

One of the others things we tell you throughout the trial because it's so important is the defendant in a criminal case is presumed to be innocent and these are important rights and the other concepts are very important and so they're reduced to what we call legal instructions and I will read those when the trial is over. There are about 30 of them, but they're short, they don't take very long and then you'll take them with you into the jury room and hopefully all the questions I haven't answered about terms and what not will become clear as you look at those.

(R190:237-239), **add. E.**

After the jury had been excused for the day, the trial court observed to the parties:

I did not notice as I spoke that any of the jurors seemed to think that the conversation was out of the ordinary. I don't think I highlighted any particular aspect. At least I tried not to by beginning with a discussion of chain and talking about burden of proof and *Miranda*. So I'm hopeful that if the jury heard that it cleaned it up and they're well aware that when two officers work together one may *Mirandize* a suspect and another not and they're never clear.

(R190:242), **add. E.**

B. Defendant Fails to Show Any Error in the Trial Court's Determination That the Officers' "Stereo" Testimony Did Not Violate the Pretrial Stipulation; However, Even Assuming Error, the Innocuous "Stereo" Testimony Did Not Prejudice Defendant.

On appeal, defendant complains that the trial court erred in denying his mistrial motion after finding that the officers' "stereo" testimony did not violate the parties pretrial stipulation. Aplt. Br. at 28-37. However, trial counsel's articulation of the parties' stipulation (*see* R190:14-15), **add. E**, is equally susceptible to the prosecutor's and the trial court's interpretation, that the prosecutor would not go into detail regarding the stereos and would not, in particular, elicit testimony from the officers' regarding defendant's admission that he stole the stereos found with the marijuana (*see* R190L 230-231), **add. E**. The trial court's ruling can be upheld on this ground.

Even if the testimony did run afoul of the parties' stipulation, any error was harmless. *State v. Wetzel*, 868 P.2d 64, 69 (citing *State v. Hamilton*, 827 P.2d 232, 240 (Utah 1992)). First, the "stereo" testimony was buried in the middle of a two-day proceeding and roughly 115 pages of witness testimony (*see* R190:125-218; R191:262, 265, 271-288). Second, defendant was not charged with an offense relating to the stolen stereos and the jury was not told of defendant's admission that he stole the stereos found with the marijuana (*see* R190:230-231), **add. E**. Third, the prosecutor did not reference the stereos in her closing argument, but did properly emphasize that, "When given the opportunity to identify the owner of the bag, [defendant] identified himself" (*see* R191:321). Thus, given the incriminating evidence that defendant claimed ownership of

the marijuana and admitted selling it because he could not find a job (R190:168), **add. E**, any reasonable jury would have convicted him for the drug crime with or without the innocuous references to the stereos also found in the black bag. *Wetzel*, 868 P.2d at 69; *Hamilton*, 827 P.2d at 240.

C. The Trial Court's Well-Crafted Statement Cured Any Possible Negative Inference Jurors Might Have Drawn From Officer Evans' Reference to a Prior Administration of *Miranda* Rights.

As for defendant's remaining mistrial ground, i.e., Officer Evans' reference to a possible prior administration of *Miranda* rights, the trial court's statement cured any possible prejudice. The trial court offered to give the curative statement, even though the trial court itself had not heard the obscure reference and doubted whether the jurors noted it (*see* R190:225-226, 242), **add. E**. Defendant initially resisted the trial court's offer for fear it would draw the jury's attention to the matter; however, he ultimately changed his mind and urged the rial court to give a curative statement:

[W]e would like the Court to make a statement to the jurors such as you suggested before about the reading of rights and indicating that sometimes officers will check with a person and see if one of the officers have, have read the rights or not to, to have the information before they do that, or you put it in [sic] a lot better tha[n] I did.

(R190:235), **add. E**. Because the trial court's statement provided a reasonable alternative explanation for the officer's question whether defendant had been previously given his *Miranda* rights, the well-crafted statement cured any possible negative inference jurors might have drawn from the testimony.

This Court will “generally presume that jury will follow the instructions given it.”

State v. Menzies, 889 P.2d 393, 401 (Utah), *cert. denied*, 513 U.S. 1115 (1995).

Defendant does not claim, nor does the record indicate, that the possibility of any prior *Miranda* warning was further referenced or emphasized at trial. Moreover, defendant points to nothing in the record demonstrating that the trial court’s curative instruction was ineffective. *See State v. Harmon*, 956 P.2d 262, 273 (Utah 1990). In other words, even assuming the jury heard Officer Evans’ testimony arguably suggesting defendant had been given *Miranda* warnings in a prior unrelated case, the testimony was not so devastating or prejudicial as to vitiate the mitigating effect of the trial court’s instruction giving the jurors another explanation. *Id. See State v. Mead*, 2001 UT 58, ¶ 50, 27 P.3d 1115 (holding trial court’s curative instructions “were sufficient to dispel any prejudice occasioned by the improper statement”).

POINT III

THE TRIAL COURT PROPERLY EXCLUDED AS UNRELIABLE HEARSAY EVIDENCE THAT A DEFENSE WITNESS HEARD ANOTHER ESSENTIALLY UNKNOWN INDIVIDUAL CLAIM THE BLACK BAG APPROXIMATELY ONE AND ONE-HALF HOURS AFTER DEFENDANT’S CONFESSION AND ARREST

In Point III of his brief, defendant claims that the trial court erred in excluding as unreliable hearsay, evidence that defendant’s sole witness, Sonya Ortiz, heard another individual claim ownership of the black bag approximately one and one-half hours after defendant’s admission and arrest. Aplt. Br. at 37-43 (*see* R191:302) (copies of the pertinent transcript pages are contained in **addendum F**). Specifically, defendant claims

Ortiz's testimony was admissible under the excited utterance exception to the hearsay rule because the individual she overheard "made the admission while under the stress of excitement caused by discovery that his bag of contraband was missing." Aplt. Br. at 37. Defendant's claim lacks merit and should be rejected.

Proceedings Below. Defense witness Ortiz was one of the people present at the picnic table at the time of defendant's arrest (R191:271-304) (copies of the pertinent transcript pages are contained in **addendum F**). According to Ortiz, another individual known to her only as "Clay," was present when Officers Dimond and Evans initially approached the picnic table, but immediately left the area (R191:276, 281, 288), **add. F**. According to Ortiz, "Clay" returned about one and one-half hours after defendant's arrest and was "angry," "yelling and swearing" (R191:282, 286, 287), **add. F**. Upon objection from the prosecutor, the trial court precluded Ortiz from testifying that "Clay" stated, "The bag was mine. That stuff was mine" (R191:296), **add. F**.

The trial court rejected defendant's claim that the out-of-court declaration was admissible under the excited utterance exception to the hearsay rule (R191:283, 290-306), **add. F**. In so ruling, the trial court found the alleged declaration was not precipitated by a startling event, and was not spontaneous (R191:301), **add. F**. The trial court further found that the alleged declaration was not inherently reliable because so little was known about "Clay" (R191:301-305), **add. F**.

Analysis. "The generally accepted rationale for the [excited utterance] exception is that declarations made during a state of excitement temporarily still a declarant's capacity

to reflect and thereby produce utterances free of conscious fabrication.” *State v. Smith*, 909 P.2d 236, 239-40 (Utah 1995). Defendant, as proponent of the hearsay evidence has the burden of establishing the basis for its admission. *State v. Wetzel*, 868 P.2d 64, 69 (Utah 1993) (holding error to admit statement because proponent failed to establish now soon after assault statement was made). *See also* EDWARD L. KIMBALL & RONALD N. BOYCE, UTAH EVIDENCE LAW, § 8-45 (1996). Accordingly, to qualify the out-of-court declaration as an excited utterance, defendant was required to establish by a preponderance of the evidence that:

- (1) a “startling event” occurred;
- (2) “Clay” made a statement related to the startling event; and,
- (3) “Clay” was still under the stress or excitement of the event when the statement was made.

See Utah R. Evid. 803(2). In determining a declarant’s state of mind, trial courts also consider the following:

- the likely effects of the declarant’s age,
- the declarant’s physical and mental condition,
- the circumstances and nature of the startling event,
- the subject matter of the statement,
- and the time lapse between the event and the utterance.

Smith, 909 P.2d at 239-240.

A. The Trial Court Properly Found That the Alleged Out-of-Court Declaration Was Inherently Unreliable.

On appeal, defendant narrowly claims that the trial court failed to consider the three prongs of rule 803(2), i.e., that a startling event occurred, that the declaration was made spontaneously, and that “Clay” was still under the stress and excitement of the

startling event. Aplt. Br. at 46-47. Rather, defendant claims the trial court refused to admit the out-of-court declaration because little more was known about “Clay” than his first name, and because of the lack of notice to the State. *Id.* Defendant thus claims that the trial court’s ruling is “fundamentally unsound because it is based upon factors that do not play a role in evaluating the admissibility of excited utterance evidence.” Aplt. Br. at 48.

Contrary to defendant’s claim, the trial court’s observations as to the questionable reliability of the purported out-of-court declaration are pertinent and relevant. Indeed, “[the pivotal issue for an excited utterance is reliability.” *Wetzel*, 868 P.2d at 69. Here, defendant did not attempt to hale “Clay” into court, and while his apparent unavailability would not necessarily preclude admission of the out-of-court declaration, it did preclude the trial court from evaluating “Clay’s” age, and physical and mental ability. *Smith*, 909 P.2d at 239-240. Indeed, all that is known about “Clay” comes from Ortiz, and she claimed only to know his first name (R191:276, 281, 288), **add. F.** Defendant did not testify or introduce other evidence corroborative of “Clay’s” alleged out-of-court declaration. As a result, the trial court was reasonably skeptical about “Clay’s” existence, let alone his level of knowledge and excitement when he allegedly claimed ownership of the bag containing marijuana. *KIMBALL & BOYCE*, § 8-45 (observing that it is not essential to know a declarant’s identity, but trial courts will be skeptical about the knowledge and excitement of an unidentified declarant).

B. Even Assuming “Clay” Exists, the Trial Court Properly Found That no Startling Event Precipitated His Alleged Declaration, and That “Clay’s” Declaration Was Not Spontaneous.

Based on the above, the State remains skeptical that “Clay” even exists. However, contrary to defendant’s claim, the trial court considered more than the questionable reliability of an out-of-court declaration by an essentially unknown individual, the trial court also found that “Clay’s” alleged declaration was neither precipitated by a startling event, nor necessarily spontaneous (R191:301-305), **add. F.** These findings are well-supported in the record and should be upheld.

To qualify as “startling” for purposes of the excited utterance exception to the hearsay rule, an event must be so frightening or shocking as to “cause an excitement that stills normal reflective thought processes.” *Smith*, 909 P.2d at 239, 240 n.2 (term “excitement” includes “any aroused emotional state that is likely to still reflective capacity, such as fear and shock”). In other words, the requisite startling event must be sufficient to produce “a high degree of emotional arousal.” *Id.* (emphasis added).

Here, the trial court properly recognized that the alleged “discovery” of the missing bag or marijuana was not the type of highly emotional event contemplated by the excited utterance exception (R191:301-305), **add. F.** *See West Valley City v. Hutto*, 2000 UT App 188, 5 P.3d 1, ¶ 13 (collecting cases with examples of statements blurted out in response to startling events including, “You’re a dead man,” “Daddy shot Mommy, Mommy is dead,” “The son-of-bitch cut me”).

Further, the trial court also reasonably questioned why “Clay” did not take the bag with him when he walked away from the picnic table? (R191:306), **add. F.** The trial court’s observation leads to the reasonable inference that “Clay” left the area without the bag when he saw the uniformed officers approach because he was concerned about his proximity to, and possible association with the bag and its illegal contents. Assuming “Clay” knew the bag held contraband, his departure further reasonably suggests he anticipated the officers may be interested in the bag, and, if they discovered its contents, may well seize it and arrest anyone associated with it. Given these unrebutted and abundantly reasonable inferences, the bag’s removal or disappearance could have hardly surprised, let alone so shocked or frightened “Clay” as to still his reflective processes when he returned to the scene one and one-half hours after abandoning the bag. *Smith*, 909 P.2d at 238-240.

For the same reasons “Clay’s” alleged “discovery” does not amount to a highly emotional, shocking, frightening or otherwise startling event, the circumstances of this case do not necessarily demonstrate that “Clay’s” alleged declaration of ownership was spontaneous. It is unknown where “Clay” was during the one and one-half hours following the seizure of the bag and defendant’s confession—“Clay” may well have observed these events and spent the time ruminating as to what he would say and how he would act upon his return to the scene after police departed with defendant (*see* R191:301-305), **add. F.**

In sum, the most that can be said in defendant's favor is that, assuming "Clay" exists, his alleged declaration of ownership was related to the event at issue—the seizure of the black bag. Utah R. Evid. 803(2). However, defendant failed to demonstrate by a preponderance of the evidence that "Clay's" alleged out-of-court declaration was also precipitated by a startling event or was spontaneous. *Wetzel*, 868 P.2d at 69. Under the circumstances of this case, the police seizure of the bag and contraband therein was neither a frightening nor a shocking event likely to highly arouse "Clay's" emotional state and still his reflective processes. The trial court's well-reasoned exclusion of this questionably hearsay evidence should thus be upheld.

C. Any Arguable Error in Excluding "Clay's" Alleged Out-of-Court Declaration Did Not Prejudice Defendant.

Even assuming the trial court exceeded its discretion in excluding "Clay's" questionable out-of-court declaration, any error was harmless. *Wetzel*, 868 P.2d at 69 (citing *State v. Hamilton*, 827 P.2d 232, 240 (Utah 1992)). Defendant's warned admission that the bag and its contents belonged to him is much weightier than the out-of-court declaration of an essentially unknown individual. The jury could reasonably have determined that if "Clay" truly knew the contents of the bag or was otherwise responsible for it, he would have taken it with him instead of risking its possible discovery by approaching the officers. Moreover, defendant's clear admission that the bag belonged to him is otherwise unrebutted, i.e., defendant proffered no explanation as to why he claimed the bag and the marijuana inside if it did not belong to him. Further, at the time of his confession, defendant was not more associated with the bag and its


contents than any of the other five people sitting on the picnic table. *See, e.g., State v. Fox*, 709 P.2d 316, 319 (Utah 1985) (“[T]here must be sufficient nexus between the accused and drug to permit an inference that the accused had both the power and intent to exercise dominion and control”). Moreover, defendant’s claim on appeal that he was worried about a drug dog sniffing drugs on him is undercut by the fact that no drugs were ultimately found on his person (*see, e.g.,* R191:319). Thus, even if “Clay’s” questionable out-of-court declaration had been admitted, there is no reasonable likelihood of a different outcome, given the incriminating evidence that defendant claimed ownership of the marijuana and admitted selling it because he could not find a job (R190:168), **add. E. Wetzel**, 868 P.2d at 69; *Hamilton*, 827 P.2d at 240.

CONCLUSION

Defendant’s conviction for possession of marijuana with intent to distribute in a public park should be affirmed.

RESPECTFULLY SUBMITTED on 17 April 2002.

MARK L. SHURTLEFF
Utah Attorney General

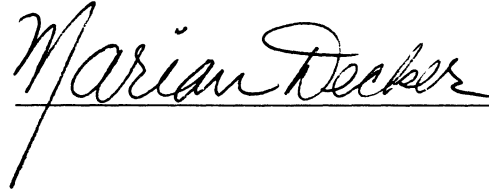

MARIAN DECKER
Assistant Attorney General

CERTIFICATE OF MAILING

I certify that on 17 April 2002, I mailed, postage prepaid, two copies of the foregoing *AMENDED BRIEF OF APPELLEE* to the following:

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A handwritten signature in cursive script, reading "Marian Decker", is written over a horizontal line.

ADDENDA

Addendum A

IN THE THIRD JUDICIAL DISTRICT COURT
IN AND FOR SALT LAKE COUNTY, STATE OF UTAH

STATE OF UTAH,	:	Case No. 001910371FS
	:	
Plaintiff,	:	Appellate Court No. 20010113-CA
	:	
v	:	
	:	
TRACY MICAH ALLRED,	:	
	:	
Defendant.	:	

PRELIMINARY HEARING JULY 11, 2000

BEFORE

THE HONORABLE JUDITH S. ATHERTON

FILED DISTRICT COURT
Third Judicial District
DEC 10 2001
SALT LAKE COUNTY
By K. Shupe
Deputy Clerk

ORIGINAL

FILED
Utah Court of Appeals

JAN 30 2002

Paulette Stagg
Clerk of the Court

CAROLYN ERICKSON, CSR
CERTIFIED COURT TRANSCRIBER
1775 E. Ellen Way
Sandy, Utah 84092
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1 SALT LAKE CITY, UTAH - JULY 11, 2000

2 HONORABLE JUDITH ATHERTON PRESIDING

3 P R O C E E D I N G S

4 MS. WISSLER: We've waived the formal reading of the
5 information and both the exclusionary rule although I -

6 THE COURT: Is there one witness.

7 MS. WISSLER: There's one witness.

8 THE COURT: All right.

9 MS. REMAL: Your Honor, I also ask that Mr. Allred
10 have one hand -

11 THE COURT: Left or right handed.

12 MR. ALLRED: Right.

13 THE COURT: Okay.

14 MS. REMAL: Take notes if you want to.

15 THE COURT: Call your witness then.

16 MS. WISSLER: Just one second.

17 The State calls Officer Bruce Evans.

18 THE COURT: All right. Would you come forward and be
19 sworn?

20 BRUCE EVANS

21 having been duly sworn, testified upon
22 his oath as follows:

23 DIRECT EXAMINATION

24 BY MS. WISSLER:

25 Q Would you state your full name, please sir, and spell

1 your last name for the record?

2 A Bruce Evans, E-V-A-N-S.

3 Q How are you employed?

4 A Salt Lake City Police Department.

5 Q And are you a certified peace officer?

6 A I am.

7 Q So, you're employed by the Salt Lake City Police
8 Department, is that correct?

9 A Correct.

10 Q Were you so employed on June the 9th of 2000?

11 A I was.

12 Q Do you recall whether you worked on that day?

13 A I did.

14 Q Were you assigned to any particular duties on June 9
15 of 2000?

16 A I am, I'm with the gang unit.

17 Q Okay, so what were you're job duties on that?

18 A I was just out patrolling.

19 Q Were you by yourself or did you have a partner?

20 A I had a partner, Officer Diamond.

21 Q And is he also with the Salt Lake City Police
22 Department?

23 A Yes.

24 Q Do you recall what general area you were patrolling
25 on that day?

1 A We were patrolling Liberty Park.

2 Q Did you have a particular purpose in patrolling
3 Liberty Park?

4 A Yes, we were looking for gang activity and also drugs
5 and narcotics.

6 Q Okay. Did you have occasion on that day to make
7 contact with some individuals in Liberty Park?

8 A We did.

9 Q And could you describe the circumstances of that
10 contact, please?

11 A I've worked in Liberty Park for quite a while and I
12 know there is a big dealing problem as well as a drug problem
13 at the basketball courts in Liberty Park and Officer Diamond
14 and myself we were pulling, as were pulling into Liberty Park,
15 I mean the basketball courts which is in the middle section of
16 the park, I noticed several individuals sitting on a picnic
17 table by the basketball courts.

18 Q Were they male or female?

19 A Male and female.

20 Q Okay. Can you describe how they were positioned?

21 A The table was, I guess, east/west with the seats on
22 north and south of the picnic table and on the north side I had
23 three females that were facing north and on the south side were
24 three males which were facing South.

25 Q Okay. Were all six of them sitting together?

1 A Yes. Altogether at the table.

2 Q Were they facing the same direction?

3 A Different directions.

4 Q Okay. So, how many males were there total?

5 A Three.

6 Q And what did you observe them doing?

7 A As we were pulling in I observed everyone sitting
8 down and then observed the defendant who was standing, he was
9 standing up by the picnic table. As he observed the police car
10 coming down the street, he quickly put something in his pocket
11 and sat down with his back towards the officers which got my
12 attention.

13 Q You observed him doing that?

14 A Yes.

15 Q Why did that get your attention?

16 A Usually when people see police officers they try to
17 hide stuff, you know, weapons, drugs, whatever, that's illegal.

18 Q Okay. Did you make contact with this individual that
19 you had seen (inaudible) in his pocket?

20 A We did.

21 Q And did you have a conversation with him?

22 A We did.

23 Q What did that conversation consist of?

24 A I explained to him as well as the other people that
25 there was, there has been a drug problem there at the

1 basketball courts and we have made several arrests and I asked
2 them if they had, you know, seen any of this activity or are
3 participating in any of this activity.

4 Q What did they indicate to you?

5 A They said they haven't and they are not.

6 Q Participating in any drugs?

7 A Yes.

8 Q Did you continue your conversation after that point?

9 A We did.

10 Q Okay. Did you ever tell any of those individuals
11 that they were not free to leave the picnic table?

12 A No.

13 Q Did any of the three individuals ever make an effort
14 to leave the picnic table?

15 A No.

16 Q Okay. Did you at some point determine that you were
17 not going to talk to these people anymore?

18 A Yeah.

19 Q At what point was that?

20 A Well, after we had talk to them and were sure that
21 they didn't have any drugs or were selling any drugs at that
22 time we were ready to leave.

23 Q So, after this conversation with them you were
24 satisfied that they weren't engaged in any activity that was
25 illegal?

1 A Yeah.

2 Q Okay. And at that point did you walk away from the
3 picnic table area?

4 A No, we were still, I was still finishing up and we
5 were just about ready to leave.

6 Q Okay. And at the time you were about to leave the
7 picnic table did something catch your attention?

8 A It did.

9 Q What was that?

10 A There was a black briefcase style bag at the end of
11 the picnic table just east of where the three males were
12 sitting, underneath the table.

13 Q Okay. How far would you say that was from where
14 these males were sitting, feet wise?

15 A Oh, five feet, five-six feet.

16 Q Okay. How close was that bag to any particular
17 individual?

18 A Probably like two feet. There was a - the females
19 were sitting on the other end of the picnic table and the bag
20 was underneath the other side which was the side where the
21 three males were sitting on.

22 Q Why did that bag draw your attention?

23 A It just seemed out of place. Black, it was like a
24 computer style. I mean you could put a computer in it or books
25 and it just seemed out of place and so I just thought it was

1 strange.

2 Q Okay. Did you make inquiries about that bag?

3 A I did.

4 Q What specifically did you ask?

5 A I asked all six individuals if that bag belonged to
6 them?

7 Q And did you receive any responses?

8 A Yes, and all six said that it did not belong to them.

9 Q Okay. So, after all six of these people had denied
10 ownership what did you do with that bag then?

11 A Well, I think was a couple playing basketball and we
12 yelled and made sure it wasn't their bag and we didn't see
13 anyone else in the area and we wanted to check and make sure
14 that there wasn't a stolen bag or, you know, someone had lost
15 the bag.

16 Q So what did you do with it?

17 A Officer Diamond opened it to look for identification.

18 Q Did he find any?

19 A He did not.

20 Q What, do you know whether he found anything in the
21 bag?

22 A Yes, he did.

23 Q What did he find?

24 A He found, I believe it was a couple of stereos, a
25 couple of stereo faces, a few screw drivers, a flash light and

1 batteries and marijuana.

2 MS. REMAL: Objection. Foundation.

3 THE COURT: Okay.

4 Q (BY MS. WISSLER) Did you find any plant like
5 substance in the bag?

6 A Yes. He found some green leafy substance in the bag.

7 Q Did you observe him or did you observe that substance
8 in the bag?

9 A I did.

10 Q Okay. What did it look like to you?

11 A It was a green leafy substance and in my experience I
12 recognized it to be marijuana.

13 MS. REMAL: Objection. Foundation.

14 Q (BY MS. WISSLER) How long have you been a police
15 officer?

16 A Four years.

17 Q And during the time you've been a police officer have
18 you had occasion to make drug related arrests?

19 A I have.

20 Q And have you had occasion to observe marijuana?

21 A I have.

22 Q And have you conducted field tests on that substance?

23 A I have.

24 Q And have you had occasion to have a positive result
25 on field tests for Marijuana?

1 A I have.

2 Q Was the substance that you observed in this black bag
3 on June 9 consistent with substances which you have field
4 tested in the past and found to be Marijuana?

5 A I have - it was. (Inaudible) and what's on the hero
6 list in the Salt Lake Police Department.

7 Q Did you and Officer Diamond find anything else in
8 this black bag?

9 A Yes.

10 Q What?

11 A There was baggies, empty baggies. I think there was
12 eight inch empty baggies and I believe the green leafy
13 substance, marijuana, was in three small baggies and two larger
14 baggies like sandwich baggies.

15 Q Okay. Did you ever at any time on June 9 determine
16 the ownership of this black bag?

17 A We did.

18 Q How did you do that?

19 A We pulled each individual, each of the six
20 individuals a side and asked them if they knew whose bag it was
21 or if it was theirs.

22 Q And what, did you ask that question of the defendant?

23 A Yes, I did.

24 Q And what did he tell you?

25 A He said it was not.

1 Q Okay. Did you have a further conversation with him
2 about the bag?

3 A I did.

4 Q And after that further conversation were you able to
5 determine whether or not it was his bag?

6 A Yes. After he said it was his.

7 Q So he indicated to you at some point that the bag
8 belonged to him; is that correct?

9 A Correct.

10 Q Okay. Did he indicate to you what he was doing with
11 the bag?

12 A Yes.

13 Q What did he say?

14 A He said that he had been selling Marijuana in the
15 park.

16 Q Did he indicate to you how long he'd been doing that?

17 A I believe it was two years - two months.

18 THE COURT: I'm sorry. What was the answer?

19 THE WITNESS: Two months, sorry.

20 THE COURT: Okay.

21 Q (BY MS. WISSLER) I'm handing you what's been marked
22 as State's Exhibit 1 and I'll ask you if you can identify that
23 document, please.

24 A It's a toxicology report from the State of Utah Crime
25 Lab.

1 Q And can you indicate whether or not that toxicology
2 report has any connection with the arrest that you made on
3 June 9 of 2000 involving the black bag about what we've just
4 been speaking?

5 A Yes. It has the same case number as my case report,
6 the case I filed.

7 Q Okay. Does it also bear the name of the defendant?

8 A Yes, it does.

9 Q Okay. Directing your attention to page two of that
10 State of Utah Toxicology Report, would you indicate, please,
11 for the Court what the result of the findings are?

12 A Yes, it says the manilla envelope was found to
13 contain 990 milligrams of crushed marijuana.

14 Q You indicated a while ago, in fact, all the events
15 we've been talking about today took place in Liberty Park; is
16 that correct?

17 A Correct.

18 Q Would you describe, please, to the Court what Liberty
19 Park is?

20 A Liberty Park is a city park where families go to have
21 a picnic or play or just recreate and have a good time.

22 Q And so it's fair to say that it's open to the public

23 A It is, uh-huh (affirmative).

24 Q And Liberty Park is located in Salt Lake County, is
25 it not?

1 A It is.

2 Q You indicated a while ago that this black bag that
3 one of these gentlemen with whom you had contact with on June
4 9th, admitted that this black bag that we were speaking about
5 belong to him (inaudible).

6 A Yes.

7 Q Do you see that gentlemen here today in the
8 courtroom?

9 A Yes, I do.

10 Q Would you indicate where he's seated and what he's
11 wearing?

12 A He is seated at the defendant table and wearing
13 yellow.

14 MS. WISSLER: Thank you.

15 I have no further questions, your Honor. I would,
16 however, move for the admission of State's Exhibit 1.

17 THE COURT: Ms. Remal?

18 MS. REMAL: No objection.

19 THE COURT: It is admitted.

20 Cross examination?

21 (Plaintiff's Exhibit 1 received)

22 CROSS EXAMINATION

23 BY MS. REMAL:

24 Q Who were the other individuals besides Mr. Allred
25 that were there that day?

1 A There was two males and three females.

2 Q What are their names?

3 A I don't have that information with me.

4 Q Do you have that information somewhere?

5 A Yeah, I believe I wrote it down in my notebook.

6 Q So you have notes independent of your typed report?

7 A Yes.

8 Q And have you turned those over to the District

9 Attorney's office?

10 A I haven't.

11 Q Yet you still have those available, however?

12 A I believe I do.

13 Q Those were part of the information that you received

14 during your investigation of the case that we're here on today?

15 A Correct.

16 Q Do you have any tape recordings or audio or video

17 recordings of any of this case?

18 A No.

19 Q How many other officers were with you during this

20 encounter in Liberty Park?

21 A One other. Officer Diamond and later another

22 officer, Officer Serio.

23 Q Excuse me (inaudible).

24 A Michael Serio. He showed up.

25 Q Were you in uniform?

1 A Yes, we were.

2 Q Were any of the other officers?

3 A Yes, all four.

4 Q And when you arrived at the basketball court were you
5 in a marked police vehicle?

6 A We were.

7 Q Were you and Officer Diamond together in the same
8 vehicle or separate vehicles?

9 A The same vehicle.

10 Q As part of your uniform do you carry guns?

11 A We do.

12 Q Now, you've indicated that this is, this is a known
13 drug activity area, the basketball court area at Liberty Park.

14 A Uh-huh (affirmative).

15 Q What do you base that statement on?

16 A Well, I've been on, before I came to the Gang Unit
17 which I just recently did about a month ago, I was with the
18 Community (inaudible) Policing Squad.

19 Q Uh-huh (affirmative).

20 A We dealt with problems in the neighborhood and as we
21 were dealing with this Liberty Park, I've been there for two
22 years, has been a constant problem as far distributing drugs
23 and using drugs at the basketball courts.

24 Q About how many cases are you, did you involve
25 yourself in investigation of drug activity in the basketball

1 court area at Liberty Park?

2 A Oh, I'm not sure.

3 Q Give me a ball park figure; two, three thousand, a
4 hundred fifty.

5 A I'd say probably six to ten.

6 Q Six to ten cases over a two year period of time?

7 A Yeah.

8 Q Okay. And prior to the date in question here which
9 is June 9th, when is the last case that you were aware of
10 whether there is drug activity in the basketball court area of
11 Liberty Park, approximately?

12 A Before I came to the gang squad I was on patrol and
13 myself and another officer arrested an individual there a
14 month, one to two months, maybe a month ago, a month and a
15 half.

16 Q Okay. If we're talking about June 9th then early
17 May, something like that?

18 A Yeah.

19 Q Late April, something like that?

20 A Uh-huh (affirmative).

21 Q Now you've indicated you drove up there because you
22 just wanted to see what these individuals were doing there in
23 that park, in the basketball area of the park?

24 A Correct.

25 Q This all occurred somewhere around seven p.m.?

1 A Yes, I believe when we approached them it was about
2 6:56 p.m.

3 Q It was still light out?

4 A Yes.

5 Q How many other people would you estimate were in that
6 park at that time?

7 A I'm not sure.

8 Q Lots of people? Would it be fair to say there were
9 quite a few people at that time?

10 A I can't remember if it was real busy or not that day.

11 Q There clearly were some people other than these six
12 individuals in the basketball court area it sounds like. A
13 couple of other people playing basketball.

14 A About two.

15 Q So, you remember at least a couple of other people?

16 A Yeah.

17 Q Were there other people in the park generally? It
18 wasn't deserted but for the basketball court area, was it?

19 A Yeah, there were people.

20 Q And you and Officer Diamond, I presume, parked the
21 police vehicle and then approached the basketball court area?

22 A Correct.

23 Q Do you remember if you did most of the talking,
24 Officer Diamond did most of the talking, or both of you talked
25 about equally.

1 A I believe I did more talking than he did.

2 Q And while you were doing the talking was Officer
3 Diamond right there near you or would he go off and talk to
4 people.

5 A He was right there with me.

6 Q Okay. What about when Officer Diamond was talking,
7 were you there together with him?

8 A Yes, except for when we took the individuals aside
9 and then he watched the others and he was standing by the
10 others while we were talking.

11 Q Now, the other officer, the third officer, when did
12 that officer arrive in relation to the activity you described?

13 A He arrived towards the end after we had made the
14 arrest then he arrived.

15 Q Now you've indicated that the first thing you did was
16 essentially notice that these individuals were sitting at the
17 table but for one individual; is that right?

18 A Yes.

19 Q And that one individual wasn't actually on the table
20 was standing near the table?

21 A Correct.

22 Q All right. Where, about how far away from the table
23 itself was that person standing?

24 A Two, three feet when I first, when I observed him.

25 Q And did he appear to be facing the people who were

1 sitting on the table?

2 A Yes.

3 Q What part of the standing individual were you looking
4 at as you pulled up in the police vehicle? For instance, the
5 front of him, the side of him, the back of him.

6 A The front of him.

7 Q And so were you looking at the backs -

8 A Yes.

9 Q - of some of the people sitting on the table.

10 A Correct.

11 Q And then he (inaudible).

12 A Correct.

13 Q You said something about seeing him observe the
14 police car.

15 A Uh-huh (affirmative).

16 Q What do you mean, how do you know he observed the
17 police car?

18 A Just, I mean, he looked, he looked up in our
19 direction from where the car was coming into. He kind of, it
20 was a ways away, he just kind of gave a look and then quickly
21 looked down and put something in his pocket and quickly sat
22 down and turned facing away from the vehicle, from the
23 direction we were coming.

24 Q About how far away were you in the police car when
25 you observed that?

1 A We had come in the road in the basketball court, it
2 was maybe fifty yards.

3 Q Were you driving the car or were you in the passenger
4 seat?

5 A I was a passenger.

6 Q How long did that activity that you observed take,
7 the looking up, putting something in the pocket and sitting
8 down?

9 A From when we saw him it was very quick. It was
10 immediate.

11 Q Just a few -

12 A It was immediate. As soon as looked up he put
13 something in his pocket and sat down.

14 Q I didn't make my question clear. How long did it
15 take him to do those things?

16 A About, you know, a second, one two seconds. It was
17 real quick.

18 Q I take it from the distance of fifty yards or so you
19 couldn't see what it was that he put in his pocket.

20 A I couldn't.

21 Q Now, it sounds like you immediately then approached
22 these six individuals and you and Officer Diamond started
23 (inaudible). As soon as you got out the police car you walked
24 right over to where they were?

25 A Correct.

1 Q And at that point all six were seated on the table.
2 The girls facing one way, the guys facing the other way.
3 A Correct.
4 Q Where were you standing in relation to them when you
5 first approached to talk to them?
6 A I was standing south of them, so I was facing the
7 three male individuals.
8 Q Okay. What about Officer Diamond? Was he on that
9 same side of the table with you?
10 A I believe he was. I'm not sure. He was somewhere.
11 He wasn't too far.
12 Q And it sounds like from what you said is something to
13 the affect of there's a drug problem here sometimes and have
14 any of you seen any drug activity or something like that.
15 A Correct.
16 Q Did you say to them also are any of you participating
17 in drug activity?
18 A Correct.
19 Q How did you phrase that?
20 A I can't remember the exact words. I just asked, you
21 know, I said we've had an ongoing drug problem here at the
22 park, you know, are you aware of that? And they said, no. And
23 we says are you guys, you know, dealing or using any drugs
24 because it seems like every time we arrive here at this picnic
25 table that stuff is going on. And they said, no.

1 Q What else did you say?

2 A That's about all I said about explaining about the
3 drug problem.

4 Q What about Officer Diamond at that point? Do you
5 remember if Officer Diamond said anything to any of the
6 individuals there?

7 A I'm not sure. I can't remember if he did. I don't
8 think he did but I'm not sure.

9 Q Now, you indicated a few minutes ago that at some
10 point you became satisfied that there wasn't any drug activity
11 and you were getting ready to leave.

12 A Correct.

13 Q And then you noticed the bag.

14 A Correct.

15 Q Did that happen right after the conversation that you
16 just described to us?

17 A Yeah, a short while after.

18 Q What else happened while you were there before you
19 decided there's nothing -

20 A Well, because, well, because I saw him put something
21 in his pocket and I wanted to make sure it wasn't a weapon -

22 Q Uh-huh (affirmative).

23 A - or, you know, something that would harm us so I
24 asked him if he had any weapons or drugs on him and he said,
25 no. And I asked if we could search him and we did, we did

1 frisk him to make sure he didn't have any weapons on his
2 person.

3 Q And you did an outside the clothing pat down?

4 A Correct.

5 Q And you didn't find anything that you felt like you
6 needed to investigate further.

7 A No.

8 Q Was it at that point then that you felt like there
9 was nothing further to do there and you were getting ready to
10 leave?

11 A Correct. Correct.

12 Q Did you and Officer Diamond express that to each
13 other or was that what you were thinking?

14 A I'm not sure if we expressed it. It was just, you
15 know, well, I think we ran him for warrants, too, just to make
16 sure since we were talking with them and they came back, once
17 they came back negative then we decided, you know, you know,
18 once, I mean there is nothing else we can do so it's time to
19 go.

20 Q How long would you say up to this point it took?
21 From the time you parked the police car until the time that you
22 finished the warrants check and were leaving?

23 A Five, ten minutes.

24 Q And are there any other conversations that you can
25 recall having with any of the six individuals that you haven't

1 already testified about here today?

2 A Yeah, I talked to one of the individuals and said you
3 look familiar and we were talking about where, where I could
4 have seen him before and probably a traffic stop or something.
5 We still weren't sure. He just looked familiar. We were just
6 talking, I just talked to him about where have I seen you
7 before.

8 Q Any other conversations up to this point with Mr.
9 Allred?

10 A No, I think that's, that's all I can remember.
11 That's all.

12 Q Now, you've indicated that as you were getting ready
13 to leave that's when you spotted this black bag.

14 A Yeah. We were still there. We hadn't actually
15 walked away, we were still

16 Q And the black bag as I understand it was sort of
17 underneath the edge of the picnic table.

18 A Uh-huh (affirmative).

19 Q On the side where the three males were sitting.

20 A Correct.

21 Q And you described it as a brief case and also as a
22 computer bag. Is it sort of a square bag that you could put a
23 lap top computer in? Is that what you mean?

24 A Yes, Uh-huh (affirmative).

25 Q And you've indicated that it was about five feet fro

1 the males and then you said something about it being two feet.
2 I wasn't clear what you meant by that.

3 A Oh, that's the distance from the females from where
4 they were sitting.

5 Q Five feet from the females and two feet from the
6 males?

7 A No. It was closer to the females because they were
8 sitting on - this is, if you have a picnic table, they were
9 sitting at this end. The three males were sitting at this end
10 and the bag was underneath the table on this side.

11 Q So, it was closer to the female side than -

12 A It was actually on the male side but closer to the
13 females because they were just across the other side of the
14 table.

15 Q And it was at that point you started asking people is
16 that bag yours?

17 A Correct.

18 Q And you asked that of all of the six individuals?

19 A I did.

20 Q Now, did you do that or did Officer Diamond do that?

21 A I did that.

22 Q And do you remember how is was you asked that
23 question?

24 A I just said, "Is this your bag", you know, and went
25 to each individual, "Is this your bag", "Is this your bag" and

1 they all said no. And then I did pull each one aside, all six,
2 and asked them individually "Is this your bag? Do you know
3 whose bag this is?"

4 Q So you sort of asked them in front of each other and
5 also individually took each one of them aside?

6 A Correct.

7 Q How did you take them aside?

8 A By saying can you come over and talk to me and I
9 said, "is this your bag? Do you know whose bag this is?".

10 Q And how far away from the picnic table did you ask
11 them to come to talk to you when you motioned them to come over
12 and talk to you?

13 A Ten, fifteen feet. Just enough where other people
14 couldn't hear if they said, yeah, it's his bag.

15 Q And Officer Diamond was over with the other
16 individuals who weren't talking to you -

17 A Yeah -

18 Q - waiting to talk to you.

19 A (inaudible)

20 Q Is that right?

21 A Correct.

22 Q Now, during that period of time the individuals
23 weren't free to leave, were they?

24 A Yeah, they were free to leave.

25 Q Even though you were motioning to each of them to

1 come to you individually and talk to you?

2 A Yeah, they were still sitting on the table and so I

3 just said "Come talk to me, tell me whose bag this is, do you

4 know whose bag it is?" And they said, no. But they could have

5 walked away. I had no reason to hold them.

6 Q You ultimately, it sounds like, decided to open the

7 bag to look for identification.

8 A Correct.

9 Q Now, you said something about yelling to the people

10 on the basketball court nearby.

11 A Correct.

12 Q And did you yell to them "is this bag yours?" or

13 something to that affect?

14 A Uh-huh (affirmative).

15 Q Yes?

16 A Yes.

17 Q You didn't look around the other parts of the park.

18 A We didn't.

19 Q Or ask anybody else who might be walking by if it was

20 their bag, only the two people on the basketball court?

21 A I did. I looked all the way around to make sure no

22 one else was in the area that the bag could belong to.

23 Q It was Officer Diamond then that opened the bag.

24 A Correct.

25 Q Were you standing right there when that was

1 happening?

2 A He was opening the bag and I was on the other end
3 over by the three male individuals when the bag was opened.

4 Q So, it was really Officer Diamond that was looking
5 through the stuff in the bag -

6 A Correct.

7 Q - at that point?

8 A Yes.

9 Q Did you ever take a close look at the contents of the
10 bag yourself?

11 A I did.

12 Q When did you do that?

13 A I did when, I think after, it was after the defendant
14 said it was his bag.

15 Q And when you looked through there didn't appear to be
16 anything with any information identifying it as belonging to
17 any particular person?

18 A Correct. There was no -

19 Q References or paperwork or anything like that.

20 A No.

21 Q And have you already listed for us all of the
22 contents of the bag?

23 A I believe so.

24 Q Now, you've indicated that at that point - well, you
25 said that at first Mr. Allred told you the bag wasn't his, ju.

1 like all of the other individuals did, right?

2 A Correct.

3 Q And then you said that in further conversation he
4 said that it was his.

5 A Correct, to Officer Diamond.

6 Q Okay. Tell me, tell me the whole conversation you
7 had with Mr. Allred during which he admitted that the bag was
8 his.

9 A To - well, I talked to him and then he said the bag
10 was not his.

11 Q Uh-huh (affirmative).

12 A And then I was talking to another individual and I
13 believe Officer Diamond had talked to him again and that's when
14 he told Officer Diamond the bag was his.

15 Q Were you part of that conversation?

16 A I wasn't.

17 Q Were you within earshot of that conversation?

18 A I was pretty close but not close enough to hear.

19 Q So you couldn't hear what it was Mr. Allred said to
20 Officer Diamond or vice versa?

21 A Correct.

22 Q Did you mention anything to Mr. Allred or any of the
23 six individuals about bringing a dog out to sniff the bag or
24 sniff the individuals?

25 A Correct, I did.

1 Q Tell me what you said about the dog.

2 A I just, I asked, you know, if they'd tell me whose
3 bag it is. If not maybe I'd have to get, we'd get a dog over
4 here that would sniff the bag and would be able to sniff the
5 person and tell who the bag belongs to.

6 Q And did you and Officer Diamond sort of discuss that
7 with each other in front of the six individuals?

8 A Yeah, Officer Diamond and I did discuss that.

9 Q And did you say something to Officer Diamond or
10 Officer Diamond say something to you about, Yeah, maybe we
11 should get, you know, a certain dog by a certain name, he's
12 really a mean one? Something like that indicating that there
13 are different dogs and some are meaner than others?

14 A Well, at first we were talking about a canine dog, a
15 regular canine dog which sniffs but - and then we decided that
16 the blood hound which we recently got on the police department
17 because he could off scent and maybe be able, you know, to
18 point out which person it is.

19 Q And did you discuss this in front of the six
20 individuals?

21 A I believe so.

22 Q Did you or Officer Diamond say something about one
23 dog being meaner than another?

24 A Probably. I think someone did say something. I
25 can't remember if it was me or him that said that about the

1 canine dogs, that they were mean.

2 Q Did you or Officer Diamond indicate anything about
3 the dogs possibly biting any individual if they were
4 uncooperative or if the dog sniffed something that appeared to
5 be drugs to the dog?

6 A I did mention to Officer Diamond about - let's see,
7 yeah, I think I mentioned it to him that in the county, that
8 the county officer and their dog found drugs in someone, I
9 guess, in the backside of someone. He had put in down his
10 pants and the dog had found it and was nippin' at his backside.

11 Q And you did that, again, in front of the six
12 individuals?

13 A Correct.

14 Q And it was after that point, after the discussion
15 that you and officer Diamond had about the dogs and the various
16 things you've just testified about that Mr. Allred said, "The
17 bag's mine"?

18 A Well, yeah, Officer Diamond talked to him and I
19 wasn't sure, I didn't hear exactly how that conversation went.

20 Q But it's your understanding that that conversation
21 with Officer Diamond is when Mr. Allred said the bag was his.

22 A Correct.

23 Q And that conversation between Mr. Allred and Officer
24 Diamond occurred after the conversation between you and Officer
25 Diamond about the dogs?

1 A Yeah, I think the conversation about the dogs was
2 before and after we were still talking about because Officer
3 Serio was actually the one the showed up with the blood hound
4 after we had made the arrest.

5 Q Were there any movements you observed by Mr. Allred
6 as you were approaching the basketball area other than what you
7 described already, the putting something in the pocket and
8 sitting down quickly? Any other movements besides those that
9 you observed?

10 A No.

11 Q Now, you've indicated that the bag contained some
12 baggies which had a green leafy substance in them.

13 A Correct.

14 Q And you testified though on previous occasions you
15 participated in field tests of a green leafy substance.

16 A Correct.

17 Q On this occasion was there a field test?

18 A No.

19 MS. REMAL: Thank you. I don't have anything
20 further.

21 THE COURT: Redirect? Ms. Wissler?

22 MS. WISSLER: Yes.

23 REDIRECT EXAMINATION

24 BY MS. WISSLER:

25 Q Officer, after the time that Mr. Allred admitted tha

1 this bag was his, did you Mirandize him?

2 A I did.

3 Q And did you question him further about the contents
4 of the bag?

5 A I did.

6 Q Did he indicate to you at that time what was in the
7 bag?

8 A Yes, he did.

9 Q Did he ever indicate to you what the green leafy
10 substance was?

11 A Yes. He admitted that it was Marijuana and that he
12 had been selling Marijuana because he was unable to get a job.

13 Q Did he also indicate to you the origin of the other
14 items in the bag?

15 A He did.

16 Q In the conversation you had about which Ms. Remal
17 just asked you relating to the dog that had bit someone, you
18 mentioned, I believe, that that was a conversation about a Salt
19 Lake County dog; is that correct?

20 A Correct.

21 Q Did you ever at any point during this conversation
22 indicate to any of the persons present that Salt Lake City had
23 a dog that would bite them if they were to turn out being the
24 owner of this bag?

25 A No.

1 MS. WISSLER: That's all I have, your Honor.

2 THE COURT: Ms. Remal?

3 RE CROSS EXAMINATION

4 BY MS. REMAL:

5 Q At what point during the chronology of what you
6 described did you Mirandize Mr. Allred?

7 A After we had, after he spoke to Officer Diamond and
8 told him the bag was his and then we went ahead and we arrested
9 him and then I went over and he was still sitting on the table
10 and everybody else had left and I Mirandized him there and
11 talked with him right there at the table.

12 Q And was the Miranda before or after Officer Serio
13 arrived?

14 A I believe it was, I'm not sure if it was before or
15 after. I'm not sure.

16 Q Was it about the time the -

17 A It was pretty close to the time.

18 Q And Officer Serio brought the dog with him?

19 A Yes, his dog was in his back seat.

20 Q Did you have any sort of conversation with Officer
21 Serio in Mr. Allred's presence about the fact that he had the
22 dog with him?

23 A I think the only time that I talked with him when he
24 was in the presence was after we were done and put him in the
25 car and was going to jail and then I talked with, I did talk

1 with Officer Serio but I don't believe he could hear.

2 Q Is Officer Serio's vehicle marked in any way to
3 identify it as a canine unit?

4 A It is not.

5 Q It's just a regular police car?

6 A It is.

7 Q Did you take notes during your conversation with Mr.
8 Allred after the Miranda?

9 A I did.

10 Q And so are those also included in the notes that you
11 have someplace?

12 A Correct, in my notebook.

13 Q You did not tape record that conversation, however?

14 A I did not.

15 Q Was Officer Diamond or Officer Serio a part of the
16 conversation or listening to the conversation after the
17 Miranda?

18 A I believe Officer Diamond came over while I was
19 talking but I'm not sure at what point he did.

20 Q And did the conversation occur there at the picnic
21 table area?

22 A It did.

23 Q And so there was only Mr. Allred of the original six
24 individuals there during that conversation.

25 A Correct.

1 Q And there were three police officers at that point;
2 you, Officer Diamond and Officer Serio?
3 A Correct.
4 Q And Officer Serio had the dog with him although the
5 dog was in the car.
6 A Correct.
7 Q Did the dog ever come out of the car to your
8 knowledge during that incident?
9 A I think at a point, I think he did let his dog out.
10 Q Can you remember if that was towards the beginning or
11 towards the end of Officer Serio being there?
12 A I'm not sure if it was, I'm thinking maybe towards
13 the end but I can't remember when.
14 Q Estimate for me the length of your post Miranda
15 conversation with Mr. Allred.
16 A I'd say ten, fifteen minutes.
17 MS. REMAL: Thank you, your Honor.
18 THE COURT: Anything further from the State?
19 MS. WISSLER: No, your Honor. The State rests.
20 THE COURT: Thank you, Officer. Thank you. You may
21 step down, officer.
22 Ms. Remal, are you intending to call any witnesses or
23 does the defendant intend to testify?
24 MS. REMAL: No, your Honor, I've just been discussing
25 with Mr. Allred his right to testify and my advice that he not

1 testify. (Inaudible) he's prepared to follow my advice and
2 we'd submit the matter, your Honor.

3 THE COURT: All right. Thank you.

4 Mr. Allred, are you following the advice of your
5 attorney in deciding not to testify today?

6 THE DEFENDANT: Yes, your Honor.

7 THE COURT: All right. No closing then?

8 MS. WISSLER: None, your Honor.

9 THE COURT: All right. I'll make the following
10 findings. I find first there is probable cause the offense was
11 committed including the enhancement of alleging that it was
12 committed in a public park, also probable cause that the
13 defendant committed the offense, therefore, I'm binding the
14 matter over, excuse me, the matter over for trial.

15 Ms. Remal, if you'll come up to the podium with Mr.
16 Allred for arraignment.

17 All right, Mr. Allred, you are now charged with
18 unlawful possession of a controlled substance or a counterfeit
19 substance with intent to distribute Marijuana. It's a second
20 degree felony, 601 East 1300 South, Salt Lake County, State of
21 Utah, on or about June 9th of the year 2000. The allegation is
22 that it is subject to an enhanced penalty alleging that this
23 offense occurred in a public park. How do you plead to the
24 charge?

25 THE DEFENDANT: Not guilty.

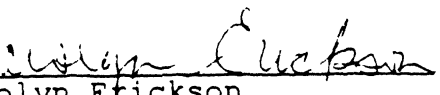
1 THE COURT: I'll enter that plea, Mr. Allred. Let's
2 set this matter for a scheduling conference.
3 COURT CLERK: July 28 at 8:30 with Judge Lewis.
4 THE COURT: All right. Thank you, Ms. Remal, Mr.
5 Allred.
6 Ms. Wissler, do you wish to withdraw your exhibit
7 then?
8 MS. WISSLER: Yes, please.
9 THE COURT: All right.
10 (Whereupon the hearing was concluded)
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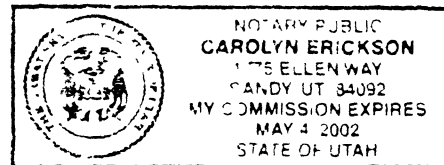
CERTIFICATE

I HEREBY CERTIFY that the foregoing transcript in the before mentioned hearing held before Judge Judith Atherton was transcribed by me from a videotape and is a full, true and correct transcription of the proceedings as set forth in the preceding pages to the best of my ability.

Signed this 6th day of December, 2001 in Sandy, Utah.


Carolyn Erickson
Certified Shorthand Reporter
Certified Court Transcriber

My Commission expires May 4, 2002



Addendum B

IN THE THIRD JUDICIAL DISTRICT COURT
IN AND FOR SALT LAKE COUNTY, STATE OF UTAH

STATE OF UTAH,	:	Case No. 001910371FS
	:	
Plaintiff,	:	
	:	
v	:	
	:	
TRACY MICAH ALLRED,	:	
	:	
Defendant.	:	

MOTION TO SUPPRESS HELD SEPTEMBER 1, 2000

BEFORE

THE HONORABLE LESLIE A. LEWIS

FILED DISTRICT COURT
Third Judicial District

MAR 27 2001

SALT LAKE COUNTY

By K. Shupe Deputy Clerk

ORIGINAL FILED

APR 23 2001

CAROLYN ERICKSON, CSR
CERTIFIED COURT TRANSCRIBER

1775 E. Ellen Way
Sandy, Utah 84092
801-523-1186

COURT OF APPEALS
20010113-24

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* * *

WITNESS

Page

SONYA ORTIZ

Direct Examination by Ms. Remal

4

Cross Examination by Ms. Wissler

14

1 SALT LAKE CITY, UTAH; SEPTEMBER 1, 2000

2 HONORABLE LESLIE A. LEWIS, JUDGE PRESIDING

3 P R O C E E D I N G S

4 THE COURT: Mr. Allred, if you'd sit with Ms. Remal.
5 Mr. Allred, I just gave your attorney and the State some good
6 news I think and that is that we had double set your case so
7 you were sure you got to go. We set it for the 5th of
8 September, which is Tuesday and we also set it for the 11th,
9 the following week, thinking that one way or another you would
10 be guaranteed a trial. Well, you can go either time because
11 the other trial set for the 5th has pled out. What's your
12 preference?

13 MS. REMAL: What she's saying is that we have a choice
14 between either of the dates and I've checked with everybody and
15 everybody's schedule is such that it doesn't really much
16 matter. Everybody can do it both days. So we could certainly
17 do it on Tuesday and the complication that I told the Judge
18 that I might possibly have, although probably won't, is that I
19 have another trial also set on the 11th.

20 THE COURT: But that's not an in-custody case?

21 MS. REMAL: It is an in-custody case. Although, I,
22 like I said I think it's probably going to resolve. But I
23 suppose -

24 THE COURT: Is this an older case than that one?

25 MS. REMAL: I don't think so. I think that one is

1 slightly older. They're both about the same time period.

2 THE COURT: You're of the opinion the other one will
3 resolve?

4 MS. REMAL: Probably. Probably. And again our pre-
5 trial conference isn't until Friday and so you never know for
6 sure until then. But I think -

7 THE COURT: Uh-huh (affirmative).

8 MS. REMAL: - that's the likelihood. So, so Mr.
9 Allred says let's do it the 5th and that -

10 THE COURT: That is your preference, Mr. Allred?

11 THE DEFENDANT: Yes, ma'am.

12 THE COURT: Okay, the 5th it is. We'll have the
13 defendant here at eight o'clock and we will ask that counsel be
14 here at 8:30. All witnesses should be here by 8:30.

15 MS. REMAL: And Your Honor, I have discussed with Ms.
16 Orteza her schedule to find out if either of those dates matter
17 to her. It's my best guess that probably we won't get to Ms.
18 Ortiz until first thing after lunch. So my intention would be
19 with regard to the Court to ask her to be here, say, I don't
20 know, 1:15.

21 THE COURT: That's fine.

22 On the first day, Ms. Remal?

23 MS. REMAL: You know, I really think it's possible we
24 may complete the whole case in one day. I don't think -

25 THE COURT: All right, well, that's always possible.

1 It's pretty optimistic -

2 MS. REMAL: I understand, but I -

3 THE COURT: - with a jury, but we'll do our best.

4 I've done it before. Now you have a witness, counsel. Is your

5 witness available on the 5th?

6 MS. WISSLER: Yes.

7 THE COURT: All right. I've taken an opportunity to

8 read these Memorandum in Opposition to Defendant's Motion to

9 Suppress. I've also taken an opportunity to read the Motion to

10 Suppress as well as the preliminary hearing transcript. Having

11 said that, I believe I'm prepared to listen to the testimony

12 and argument that you wish to make [inaudible] make.

13 MS. REMAL: Thank you, Your Honor. I think it makes

14 sense to put the first thing to have Ms. Ortiz testify.

15 THE COURT: Ms. Ortiz, do you want to come forward and

16 we'll swear you in.

17 MS. REMAL: She's just getting served with a subpoena

18 for Tuesday, so let me make sure that that's done.

19 THE COURT: Okay, Ms. Ortiz, now that you've got that,

20 can you come forward to be sworn?

21 SONYA ORTIZ,

22 having been first duly sworn, testified

23 upon his oath as follows:

24 THE COURT: Ms. Ortiz, what you're going to find is

25 that the acoustics in here are not very good so I want you to

1 lean into the microphone and speak up as loudly as you can,
2 okay?

3 MS. ORTIZ: Okay.

4 MS. REMAL: Your Honor, can I ask the Court's
5 permission to allow Mr. Allred to have one pen, a [inaudible]
6 so that he can take notes.

7 THE COURT: Yeah, certainly.

8 MS. REMAL: [inaudible] material, thank you.

9 DIRECT EXAMINATION

10 BY MS. REMAL:

11 Q Sonya, would you state your full name and spell both
12 your first and your last name for us?

13 A Okay, my name is Sonya Ortiz, S-O-N-Y-A O-R-T-I-Z.

14 Q And Sonya, how old are you?

15 A I'm 17.

16 Q And where do you live?

17 A On 1749 South 900 East.

18 Q Okay, and is that in Salt Lake?

19 A Yes.

20 Q Okay. Sonya, I want you to think back to June 9th of
21 this year and ask you if you remember being in Liberty Park on
22 that day?

23 A Yes.

24 Q And do you remember -

25 THE COURT: I'm sorry.

1 MS. REMAL: I'm sorry.

2 THE COURT: Repeat that please -

3 MS. REMAL: Sure -

4 THE COURT: - I was trying to do two things.

5 Q (BY MS. REMAL) I want you to think back to June 9th

6 of this year and ask you if you remember being in Liberty Park

7 on that day.

8 A Yes.

9 Q Do you remember about what time you got to Liberty

10 Park that day?

11 A I'm not sure.

12 Q Do you remember kind of the time of the day in terms

13 of was it morning, was it afternoon -

14 A Late afternoon.

15 Q Were you with anybody or with you, were you by

16 yourself?

17 A I was with two of my friends.

18 Q What are their names?

19 A Krystal and Megan.

20 Q And did all three of you go together to the park?

21 A Yes.

22 Q While you were there with your two friends, what

23 generally were you doing?

24 A Just walking around.

25 Q And at some point did you meet up with some guys

1 there?

2 A Yeah.

3 Q What part of the park were you in when that happened?

4 A By the basketball courts.

5 Q And how many guys were there that you met up with,

6 with your friends?

7 A There's at least five, maybe more.

8 Q And I'll ask you to look around the courtroom here

9 today. Do you recognize anybody in the courtroom as being one

10 of those people you met up with that day?

11 A Yes.

12 Q Can you point to that person and describe what that

13 person's wearing?

14 A The yellow jumpsuit.

15 THE COURT: Okay, for the record, yeah, she's

16 identified the Defendant.

17 Q (BY MS. REMAL) Had you known this young man before

18 that day?

19 A No.

20 Q Have you had any contact with him since that day?

21 A No.

22 Q Do you remember what his name is?

23 A Tracy.

24 Q And when you met up with these guys with, with your

25 friends, what did all of you do?

1 A Just sit around and talk.

2 Q At some point was there some contact you had with
3 some police officers?

4 A Yes.

5 Q And how long had you been talking with these guys
6 before the police officers came up to you?

7 A Oh, 15, 20 minutes.

8 Q And were you near anything in particular when the,
9 when the police officers came?

10 A Hmm.

11 Q Were you sitting on anything, or by -

12 A A table.

13 Q What kind of a table?

14 A Like a picnic table.

15 Q Were there benches or chairs of some sort by the
16 table?

17 A Yes.

18 Q And describe to me what you remember about the police
19 coming up to you.

20 A They had approached us and told us that they were,
21 that they had a phone call and, and the phone call had told
22 them that there was a drug deal that was going on.

23 Q How many police officers were there?

24 A Two.

25 Q And were they in uniform or not in uniform?

1 A They were in uniform.

2 Q Did you see whether they got out of a car of any
3 sort, or vehicle of any kind?

4 A A cop car.

5 Q And was it a marked police car or a plain car?

6 A A marked.

7 Q And when the police officers came up to you, did one
8 do all the talking or did they both talk to you at -

9 A They both did.

10 Q I'd ask you to look around the courtroom here today
11 and see if you see either of those police officers here?

12 A Right there.

13 Q And can you -

14 THE COURT: I didn't hear that. What -

15 Q (BY MS. REMAL) Can you point to that person?

16 THE COURT: And did you say anything before?

17 A (BY MS. ORTIZ) I just said right there.

18 THE COURT: Okay. And she had pointed to the
19 gentlemen seated with Ms. Wissler.

20 MS. REMAL: And, Your Honor, I believe that that's
21 Officer Evans for the record.

22 THE COURT: All right, thank you.

23 Q (BY MS. REMAL) Did you ever notice if there was any,
24 any bags or packages or anything there near where you were?

25 A There was a bag laying on, on the side of the table.

1 Q Can you remember what it looked like?
2 A It was just a black bag.
3 Q About how big was it would you say?
4 A Probably like that big. I'm not -
5 Q So you're showing us with your hands, maybe about two
6 and a half feet long?
7 A Yeah.
8 Q Something like that? And how wide do you think it
9 was?
10 A Probably like that wide. I'm not sure.
11 Q So maybe about six to nine inches wide, something
12 like that?
13 A Yeah.
14 Q Did you notice if it had any handles or anything?
15 A May have had a strap.
16 Q Did you ever notice anybody, any of the guys or, or
17 you, your friends touching it or doing anything with the bag?
18 A No.
19 Q Did you learn the names of the other guys who you met
20 there that day besides Tracy, can you remember?
21 A Two or three I think.
22 Q What do you remember their names?
23 A Abdul was one. Quade, I can't remember any other
24 ones.
25 Q Now when the police officers got over to where you

1 were, were all of these same people here, you and your friends
2 and the, at least five guys?

3 A No. There was like some of them left, like two or
4 three or four of them left.

5 Q Can you remember whether Tracy was one of the ones
6 that left or was Tracy one of the ones that was still there?

7 A No, he stayed.

8 Q Can you remember the names of the people who left?

9 A One of the ones that left was the one Quade.

10 Q Do you remember when they left? Was it before the
11 police officers came over or as the police officer came over or
12 after the police officer -

13 A It was as the police officers approached us.

14 Q And you indicated that when the police officers came
15 over they said something about getting a phone call. What
16 happened after that?

17 A A phone call?

18 Q Didn't, you indicated a minute ago that the police
19 officer said they got a phone call about some drug deal.

20 A Oh, yeah.

21 Q What happened after that?

22 A They asked if we had seen any drugs or anything of
23 that sort.

24 Q And, and were you all together when that was being
25 asked of you?

1 A Yeah.

2 Q And what did everybody say?

3 A "We haven't seen anything like that."

4 Q And then what happened after that?

5 A They saw the bag and they picked it up and asked who
6 it belonged to.

7 Q And did, did anybody answer to that question?

8 A No.

9 Q What happened? Did everyone just sit there, or, or
10 what?

11 A We told them that we didn't know whose it was.

12 Q And so then what happened?

13 A I think they searched the bag.

14 Q And could you tell what was in the bag after they
15 searched it?

16 A They took everything out.

17 Q Where did they put it?

18 A On the table.

19 Q And so were you able to see the items they took out
20 of the bag?

21 A Yes.

22 Q What do you remember seeing was inside the bag?

23 A Car stereos, screwdrivers, a bag of marijuana.

24 Q And after they took the stuff out of the bag, what
25 happened after that?

1 A They put it back in and asked us again if it had
2 belonged to any of us.

3 Q And what was, what was the answers that were given?

4 A We still denied it belonging to us.

5 Q Did any of the police officers ever talk to you or
6 any of the other young people there separately instead of in a
7 group?

8 A Yeah, they questioned us individually.

9 Q Describe how that happened.

10 A They, they asked us who does that belong to again,
11 and then they said that they'd like to question us individually
12 and see -

13 Q And so did they ask you one by one to go someplace
14 else?

15 A Yeah.

16 Q Where did you go?

17 A By a tree that was a couple feet away.

18 Q And -

19 THE COURT: That was what?

20 THE WITNESS: That was a couple feet away.

21 THE COURT: Okay.

22 Q (BY MS. REMAL) And did you notice whether the police
23 officers talked to each one of you young people separately?

24 A Yes.

25 Q And were both police officers doing that, or was one

1 police officer doing it?

2 A Just one, and then the other one stayed with the
3 group.

4 Q Was there ever a time that you tried to, to leave the
5 location of the picnic table and go someplace else?

6 A Yes.

7 Q What was, what happened then?

8 A We asked if we can use the restroom.

9 Q And who do you mean by we asked?

10 A Me and my two friends.

11 Q Your two girlfriends?

12 A Uh-huh (affirmative).

13 Q And do you remember whether the police officers
14 responded to that?

15 A They told us that we couldn't leave until they got to
16 the bottom.

17 Q Do you remember which police officer said that, or
18 was it both of them, or don't you remember?

19 A It was both of them.

20 Q Was there ever anything said about a police dog
21 coming?

22 A Yes.

23 Q When did, when was there some discussion about that?

24 A After they had spoken to us all individually and
25 still no one admitted the bags to belonging to us, they said

1 that they were going to bring in a dog and if any of us had any
2 involvement with the bag that the dogs would be able to sense
3 it.

4 MS. REMAL: I believe that's all the questions I have.
5 Ms. Wissler might have some questions for you.

6 THE WITNESS: Okay.

7 MS. WISSLER: I just have a couple of questions.

8 CROSS EXAMINATION

9 BY MS. WISSLER:

10 Q You indicated that the officers took each one of you
11 aside and asked you some questions about this bag -

12 A Uh-huh (affirmative).

13 Q Is that right?

14 A That's right.

15 Q Did they put you in handcuffs when they did that?

16 A No.

17 Q Did they ever put you in handcuffs?

18 A No.

19 Q Okay. Did they take Tracy aside the same way they
20 took the rest of you aside?

21 A Uh-huh (affirmative).

22 Q And you watched them do that?

23 A Yes.

24 Q Okay. Did you ever see a dog that day?

25 A I think they brought it in the other car.

1 Q Do you recall when you saw the dog, physically?

2 A After they had handcuffed Tracy.

3 MS. WISSLER: Okay, thanks, that's all I have.

4 THE COURT: May I ask a couple of follow-up?

5 MS. REMAL: Surely.

6 THE COURT: Did they ever take the dog out of the

7 car?

8 THE WITNESS: Yes.

9 THE COURT: And what did they do with the dog?

10 THE WITNESS: They just took the dog around the area

11 of the basketball court and just let him sniff around.

12 THE COURT: Were you present when anyone admitted that

13 the black bag was theirs?

14 THE WITNESS: No.

15 THE COURT: Okay, thank you. I have nothing further.

16 Any follow-up from either side?

17 MS. WISSLER: No, Your Honor.

18 MS. REMAL: No, Your Honor.

19 THE COURT: All right, Ms. Ortiz, thank you for your

20 assistance. You may stand down and we'll see you on Tuesday.

21 MS. ORTIZ: Okay.

22 MS. REMAL: Thank you, Your Honor.

23 Now you say you [inaudible] come back to this same

24 courtroom, but instead of coming in to the courtroom, just wait

25 outside in the hall, okay, and then when we're ready for you

1 we'll come out and get you and bring you in, okay?

2 MS. ORTIZ: [inaudible].

3 MS. REMAL: And don't talk about the case with anybody
4 [inaudible] there may be other witnesses standing outside,
5 sitting -

6 THE COURT: Yeah, Ms. Ortiz, that's extremely
7 important and I'm glad Ms. Remal brought it up. One of the
8 rules in criminal cases is that we have an exclusionary rule,
9 which means that no one who's a witness has the right to talk
10 about the case with anyone else who's a witness, and the reason
11 for that is so that your memory remains your memory and someone
12 else's memory remains their's. You know how if you talk with a
13 group of people after a while you can't remember who said what?
14 Well what we like to do in a court of law is make sure that
15 people only speak of what they remember. So you should not
16 discuss this with the defendant, not with any other witnesses,
17 including your girlfriends. The only one you would, ones you
18 would want to discuss it with are the two attorney's, okay?

19 MS. ORTIZ: Okay.

20 THE COURT: Okay, thank you.

21 MS. REMAL: You might want to bring like a magazine or
22 a book or something [inaudible] time. Even though we estimate
23 [inaudible] okay?

24 THE COURT: All right, any other witnesses Ms. Remal?

25 MS. REMAL: No, Your Honor. I do have, if the Court

1 will allow, a correction on one of the pages of the preliminary
2 hearing transcript. I noticed when I was looking at it last
3 night that one of the questions I'd asked, [inaudible] -

4 THE COURT: And what page are we on?

5 MS. REMAL: Page 26, appeared to be incomplete and
6 although I certainly sometimes ask incomplete questions -

7 THE COURT: Rarely.

8 MS. REMAL: Right here, I've highlighted it for you so
9 that -

10 THE COURT: Let's see, and that conversation between
11 Mr. Allred and Officer Dimond about the dog, oh, occurred after
12 the conversation between you and Officer Dimond about the dogs,
13 do you accept that correction?

14 MS. WISSLER: I do, Your Honor. I haven't reviewed
15 the tape but I certainly -

16 MS. REMAL: And I have the tape here for you if you'd
17 like to see that.

18 MS. WISSLER: That's fine, [inaudible], not a
19 problem.

20 THE COURT: Let me change it on mine. Are there
21 going to be any more witnesses?

22 MS. WISSLER: No, Your Honor, we submit it on the
23 (inaudible).

24 THE COURT: Would you like to make argument?

25 MS. REMAL: I would, Your Honor. [inaudible] --

1 THE COURT: All right.

2 MS. REMAL: - would like to wait until I'm done to
3 respond.

4 THE COURT: One thing, so that I don't forget and I do
5 want to hear from both of you if you wish to address this and
6 I'll give you back your copy since I've corrected mine. I
7 appreciate that. I don't have any jury instructions or voir
8 dire. Do you all happen to have them with you?

9 MS. REMAL: No.

10 THE COURT: Ladies, ladies, ladies, when can I expect
11 these from you?

12 MS. REMAL: Depends on how quickly we're done here.
13 I can probably have them to you by five.

14 THE COURT: Well I'll, I'll do this. I want them by
15 eight o'clock on Tuesday and if you will do that for me, I
16 won't make you do it tonight. But I want them at eight so that
17 I can look them over and see what I will and will not allow and
18 then I'm going to allow you both to do some of your own voir
19 dire. What I will do is ask the stock and then let you have
20 liberty to follow-up on any of the stocks and ask any of your
21 own questions.

22 I also want to know who the witnesses are going to be
23 since we don't have witness lists or exhibit lists. Start with
24 you if we could, Ms. Wissler.

25 MS. WISSLER: Your Honor, I anticipate calling the

1 officers involved.

2 THE COURT: Give me their names.

3 MS. WISSLER: Officer Dimond and Officer Evans, he's
4 here today. I understand we do not have a stipulation as
5 to the chain of custody so I need to call the chain of custody
6 witnesses.

7 THE COURT: And who are they?

8 MS. WISSLER: That would be I believe Amy Despain -

9 THE COURT: Uh-huh (affirmative).

10 MS. WISSLER: Bill Neves, and [inaudible] -

11 THE COURT: Wait, one more time, Bill?

12 MS. WISSLER: I'm sorry, Bill Neves, N-E-V-E-S, and
13 Ted [inaudible] from the crime lab and toxicologist.

14 THE COURT: And who's the toxicologist?

15 MS. WISSLER: Barbara Hopkins.

16 THE COURT: Who?

17 MS. WISSLER: Barbara Hopkins.

18 THE COURT: Okay, anyone else?

19 MS. WISSLER: No, Your Honor, that's all I anticipate
20 calling.

21 THE COURT: Okay, and Ms. Remal?

22 MS. REMAL: Your Honor, I anticipate that we'll be
23 calling Ms. Ortiz and we may or may not call Mr. Allred. We'll
24 decide that as we progress.

25 THE COURT: Okay, and those are the only two

1 potential witnesses?

2 MS. REMAL: I probably should list Dennis Couch. I
3 don't anticipate calling him, but in the event that there's
4 some last minute thing that I ask him to do and come and
5 testify about.

6 THE COURT: Okay. All right, now what about
7 exhibits?

8 MS. WISSLER: Your Honor, I only anticipate two
9 exhibits, that being the black bag that we discussed and the
10 contents, being the marijuana. I'm not interested in the car
11 stereos.

12 THE COURT: All right, so you're going to present I
13 assume as initially one exhibit, marked one, and then when you
14 remove any pieces or parts from it, you would have them
15 separately marked.

16 MS. WISSLER: Right.

17 THE COURT: And then what about the tox report?

18 MS. WISSLER: That also.

19 THE COURT: Okay. All right. That's helpful, and
20 now I'm happy to hear your arguments.

21 MS. REMAL: Your Honor, as I didn't have the
22 preliminary hearing transcript yet at the time of the motion,
23 if you think it would be helpful to Your Honor I've pinpointed
24 pages and lines in the preliminary hearing transcript that I
25 think that are significant.

1 THE COURT: That's helpful.

2 MS. REMAL: And, and let me go through those. It's
3 clear that Officer Evans and Officer Dimond approached the
4 young people who were sitting at the picnic table in Liberty
5 Park and we know that from the preliminary hearing Pages 2 and
6 3. We know that later on a third officer, Officer Serrio I
7 believe is his name, came with a dog and that was way towards
8 the end of the, the entire incident, preliminary hearing Page
9 11. The officers were in uniform, including guns, not drawn,
10 but guns that are part of their uniform and were in marked
11 police vehicles, that's at the preliminary hearing Page 12.

12 The officers questioned the young people there at the
13 picnic table about whether there was any drug activity, either
14 seen by them or that they participated in. They said that they
15 neither seen any or participated any, in any, that's
16 preliminary hearing Page 4.

17 Mr. Allred was frisked for weapons, that's at
18 preliminary hearing Page 18. The young people were run for
19 warrants. That took five to ten minutes. That's at
20 preliminary hearing Page 19. A bag was noticed near the table,
21 sort of on the ground by the picnic table. That's at
22 preliminary hearing Page 5. The officers questioned the young
23 people about whether the bag was theirs. They all said no.
24 That's at preliminary hearing Page 6.

25 The officers looked inside the bag and saw items,

1 including the green leafy substance, which ultimately was
2 determined to be marijuana. That's at preliminary hearing Page
3 6.

4 The officers pulled each of the six aside by Officer
5 Evans' prelim testimony, 10 to 15 feet from the others, to
6 question them individually about the bag and ownership of the
7 bag. That's at preliminary hearing Page 21.

8 Each of the young people were questioned individually
9 about the ownership of the bag. That's also preliminary
10 hearing Page 21.

11 Officer Evans testified at the preliminary hearing
12 that in his view each of the young people were free to leave.
13 That's at preliminary hearing Page 21 and onto Page 22.

14 There was a discussion between Officer Evans and
15 Officer Dimond regarding bringing a drug sniffing dog to the,
16 the scene there, to come down and sniff out who the bag
17 belonged to. That's at preliminary hearing Page 24 and 25.

18 One of the officers mentioned that they have canine,
19 canine dogs which are mean. That's at preliminary hearing Page
20 25.

21 Officer Evans indicated to Officer Dimond in front of
22 the six young people that there was a dog that was used in the
23 County who had bitten someone's back side. That was at
24 preliminary hearing Page 25.

25 That it was after the discussion about the dogs that

1 Mr. Allred for the first time admitted to Officer Dimond that
2 the bag was his and there may have been more discussion,
3 according to Officer Evans, about the dogs after that statement
4 was made. That's at preliminary hearing Page 25 and on to Page
5 26, and Officer Evans himself Mirandized Mr. Allred after Mr.
6 Allred had already made the statement to Officer Dimond about
7 the bag being his and that's at preliminary hearing Page 28.

8 Your Honor, my Motion itself was perhaps not as clear
9 as it ought to have been and so I'm hoping I can make that
10 clearer today. There are actually two separate statements made
11 by Mr. Allred to the police officers as I understand it. One
12 was made to Officer Dimond, that's the first statement that was
13 made and then there was a second statement that was made by Mr.
14 Allred to Officer Evans. The testimony at the preliminary
15 hearing indicates that, as far as I can tell, the statement to
16 Officer Dimond was done without benefit of a Miranda warning
17 being given, but certainly the statement made subsequent to
18 that by Officer Evans was after Miranda warnings were given.

19 In my view, Your Honor, the first statement by Mr.
20 Allred, and that's the one to Officer Dimond, ought to be
21 suppressed because in my view it was a custodial interrogation
22 and there was no Miranda given.

23 THE COURT: What exactly was said at that time, just
24 that the bag was his?

25 MS. REMAL: The bag was his, yes, that's my

1 understanding, Your Honor.

2 THE COURT: All right, now how do you, what is your
3 perception as to how you establish that he's in custody?

4 MS. REMAL: Your Honor, -

5 THE COURT: He was not totally under arrest, as I
6 understand it and he's not in cuffs.

7 MS. REMAL: That's correct, Your Honor.

8 THE COURT: And -

9 MS. REMAL: - those two things are, are correct.

10 THE COURT: - my understanding is they were free to
11 leave.

12 MS. REMAL: Your Honor, as the, the, both the State's
13 Memo and my motion indicate, State, Salt Lake City v. Carner
14 has indicated that there are four factors the Court should look
15 at in determining that. The site of the interrogation, whether
16 the investigation is focused on a particular person, whether
17 the objective indicia of arrest are present and the length and
18 form of the interrogation.

19 Certainly the site of the interrogation being at the
20 park is not something that indicates necessarily that Mr.
21 Allred was in custody, as it would for instance if it were in a
22 jail or, or police department. Whether or not the
23 investigation focused on Mr. Allred, it appears to me that it
24 focused on each of them at the time that they were questioned
25 individually, and although that focus shifted from person to

1 person, certainly at the time that Mr. Allred was being
2 individually questioned it was focused on him.

3 The length and form of interrogation, in my view,
4 Your Honor, it's certainly not an extremely rapid situation,
5 because we know that from start to finish there was time enough
6 for them to be frisked, for there to be a discussion about
7 whether or not there was drug activity observed or participated
8 in, there was a warrants check that took five to ten minutes,
9 there was then the questioning of the individuals in the group
10 about the bag and the contents, then there was the individual
11 questioning of all of them.

12 THE COURT: Did anyone ever suggest though with
13 specificity how long it took?

14 MS. REMAL: Not to my recollection, Your Honor.

15 THE COURT: Okay.

16 MS. REMAL: The only time frame that I recall is that
17 Officer Evans testifying that the warrants check itself he
18 believes took between five and ten minutes.

19 The form of the interrogation, Your Honor, in my
20 view, took two forms. It was both direct questioning and was
21 what I believe is the functional equivalent of questioning.
22 Certainly there was the direct questioning, "Is this bag yours,
23 who's bag is this, who's stuff is this in the bag," and in my
24 view, Your Honor, the discussion by the two officers in front
25 of the individuals about the dog, about there being a mean dog,

1 about did you remember about that dog who bit somebody, is the
2 functional equivalent of questioning in combination with a
3 suggestion to the individuals that if somebody doesn't own up
4 to the bag, they're going to bring the dog, some of the dogs
5 are mean and we know that dogs sometimes bite people and so in
6 my view -

7 THE COURT: So you're saying that's coercion?

8 MS. REMAL: I'm saying that that's coercive, Your
9 Honor.

10 In regards to the objective indicia of arrest
11 present, certainly it's true handcuffs were not used. It's
12 true that, that as far as I know the words you're under arrest
13 were not, were not spoken during the time of the questioning.
14 But in my view, Your Honor, there are other indicia of arrest
15 or custody. The officers were in uniform. They were in a
16 marked police vehicle and had guns as part of the uniform,
17 although there's no suggestion that they were drawn or pointed.

18 THE COURT: I think there was a comment, you correct
19 if I'm wrong, in the preliminary hearing transcript that the
20 officers or one of the officers had essentially made a
21 determination that this was not a problematic scenario, that
22 there were no drugs, was ready to let them all go when the
23 black bag was spotted.

24 MS. REMAL: That, I believe you're accurate about
25 that being the testimony.

1 THE COURT: So what do you, at a certain point in
2 time when the questioning began, there was a free [inaudible]

3 MS. REMAL: Well, Your Honor, I, this is -

4 THE COURT: Arguably.

5 MS. REMAL: - why I wanted the Court to hear Ms.
6 Ortiz' testimony. So that you could hear her testimony about
7 the fact that she and her girlfriends asked to use the restroom
8 and, and were told by the officers they were not allowed to
9 leave and go to the restroom until they got to the bottom of
10 this and so I believe that that's an important indicia that in
11 fact the young people were not free to leave because they
12 specifically asked and were denied permission to do that.

13 Your Honor, I think other indicia of, another indicia
14 of arrest or custody is the separation of each of the young
15 people from the others to be questioned individually and the
16 fact that that separation occurred by moving them physically
17 from the location of the picnic table where the other kids were
18 over to someplace else could be questioned by an officer out of
19 the hearing on the others. So in my view, Your Honor, when you
20 put all those indicia together, it does indicate custodial
21 situation.

22 Your Honor, in regards to the statement to Officer
23 Evans, clearly that was an in-custody statement. At that time
24 Mr. Allred was handcuffed and sitting on the picnic table
25 according to Officer Evans' testimony. So I don't think that's

1 a question. Certainly there was Miranda given at that time.
2 Officer Evans testified at the preliminary hearing that he did
3 so prior to questioning Mr. Allred, but that that questioning
4 took place right after Mr. Allred had made his statement to
5 Officer Dimond and admitted the bag was his.

6 In my view, Your Honor, that then puts us in a
7 situation where the Court has to make a determination, well,
8 first the Court has to make a determination if it's problematic
9 that Miranda was not given during the questioning by Officer
10 Dimond.

11 THE COURT: Which, of course, turns on whether or not
12 there was a custodial situation.

13 MS. REMAL: Correct, correct.

14 THE COURT: And I can't see, although I understand
15 your point about the young woman and the restroom, I can't see
16 that it was custodial. In fact, to me the preliminary hearing
17 appears to have concluded or the testimony seems to have
18 indicated that the officers were leaning toward releasing the
19 whole group of people at the point in time just before the
20 defendant acknowledged that the bag was his. It's a tough one,
21 because as you say the young woman asked to use the restroom
22 and they said not til we get to the bottom of this. That to me
23 doesn't mean she can't leave. What it means is that they're
24 trying to control a group of people and keep them perhaps from
25 talking to one another and don't want them sort of out of their

1 sight. But it isn't the same as putting them in custody and
2 forbidding them to leave the vicinity. So I can't really find,
3 unless there's more that I've missed, that the first statement
4 was custodial. Obviously, one would have liked there to have
5 been a Miranda warning given immediately and for the young
6 woman to have been taken to the restroom if they were worried
7 about conversation, were allowed to go to the restroom. But my
8 concern about that is not that great.

9 Let me ask you this, what was said after Miranda to
10 Detective Evans?

11 MS. REMAL: Let me point you to the part of the
12 transcript that, what was said to my recollection, Your Honor,
13 is that Mr. Allred stated that the bag was his and that he had
14 been selling marijuana in the park for the last couple of
15 months because he'd been unable to find employment. Your
16 Honor, on Page 27 of the preliminary hearing transcript, Ms.
17 Wissler was asking Officer Evans about that conversation and
18 Officer Evans indicated that he had, Mr. Allred had admitted
19 the bag was his, that he admitted that it was marijuana, that
20 the green leafy substance was marijuana and that he'd been
21 selling marijuana because he was unable to get a job.

22 THE COURT: All right, so what is your position
23 concerning, what if I keep out the first statement, the no bag,
24 or the bag is mine and don't allow any reference to that first
25 reference to the bag? He wasn't mirandized. One could argue

1 that he was in custody and only allow in what comes after
2 Miranda.

3 MS. REMAL: And, Your Honor, my argument about, about
4 that second statement by Mr. Allred to Officer Evans after
5 Miranda is that, that the Court is then in a position where you
6 have to make a determination whether or not the second
7 statement was an exploitation of the prior improper statement
8 because it wasn't mirandized and I think that there are cases
9 such as *State versus Arroyo* and *State versus Allen*, which talk
10 about if there's a prior police misconduct or illegality and
11 then something else that happens afterwards the Court has to
12 make a decision about whether there's enough attenuation to
13 essentially purge the taint of that initial -

14 THE COURT: We've got two different officers
15 involved.

16 MS. REMAL: Right.

17 THE COURT: We don't have the same officer. We don't
18 have the officer, as I recall and I could be wrong, saying I
19 understand you just said the bag was yours. It sort of
20 starts a fresh, as I recall. And you're in a park, which never
21 changes. You're not taken to police headquarters. You're not
22 even put in a patrol car. While it's not clear exactly how
23 long this took, it doesn't appear to have been inordinately
24 long from what Ms. Ortiz said or from the preliminary hearing
25 transcript. The focus was not on the defendant until he had

1 acknowledged the bag was his.

2 There are, as far as I can tell, no indicia of arrest
3 except certainly the defendant was under arrest when he was
4 told he's under arrest and the cuffs were put on. Before that
5 the only thing you've got is Ms. Ortiz' limitation on using the
6 restroom, and I guess my question on that would be Liberty
7 Park's pretty big and there are a lot of different restrooms
8 and I'd be interested in where the restroom was in relation to
9 where she was.

10 I'll tell you what troubles me, frankly, is this
11 reference to the dog. I think this is coercive, or potentially
12 coercive and I don't like it at all, and was that after the
13 Miranda?

14 MS. REMAL: The, the discussion about the dogs was,
15 as I understand it, prior to both statements Mr. Allred made.
16 Prior to the statement to Officer Dimond and, and also prior to
17 the statement to Officer Evans. There appears that there was
18 discussion both before and after the statements, but certainly
19 some of it was before.

20 THE COURT: And I wouldn't have any problem with an
21 officer saying, you know, we have dogs that can sniff out
22 marijuana. If there's more marijuana around here we may bring
23 them out. But to suggest that the dog can bite someone and do
24 damage and harm someone is frankly problematic. I think it's
25 poor police work.

1 MS. REMAL: And, Your Honor, that -

2 THE COURT: Potentially coercive.

3 MS. REMAL: That, that's the basis of my argument,
4 which is really separate from the Miranda that Mr. Allred's
5 statement was not voluntarily given, but rather given as a
6 product of the fact that he'd been told about, they'd all been
7 told about these dogs potentially being brought or a dog
8 potentially being brought, that at least some of the dogs that
9 are police dogs are mean and there's been an instance at least
10 once where someone's been bitten during the process of sniffing
11 them out. And in my view that's the very kind of coercion that
12 makes a statement involuntary.

13 And just so the record is clear, and I understand
14 what the Court's feeling is about the statement that Mr. Allred
15 gave to Officer Dimond, but just for the record, my argument
16 about Officer Evans' Mirandized statement is that it's, it's
17 not attenuated enough from the initial Officer Dimond statement
18 and therefore it can't be used either.

19 THE COURT: [inaudible]

20 MS. REMAL: Just [inaudible] -

21 THE COURT: Let me ask you this, is there a discussion
22 between Officer Allred [sic] and Officer Dimond about the first
23 statement before the second statement is made after Miranda?

24 MS. REMAL: It was my understanding from the
25 preliminary hearing that although Officer Evans wasn't part of

1 that conversation and didn't overhear it that he understood
2 that a confession had been made and that's why they had
3 arrested Mr. Allred, that Mr. Allred was already under arrest
4 at the time that Officer Evans spoke to him.

5 THE COURT: Okay, did you wish to say anything else?

6 MS. REMAL: No, Your Honor, I think, I think the
7 Court understands my argument.

8 THE COURT: All right.

9 Counsel?

10 MS. WISSLER: Your Honor, I'll be brief. I don't know
11 whether Your Honor received a copy of the memorandum I filed
12 [inaudible] I have -

13 THE COURT: No, but I -

14 MS. WISSLER: - [inaudible] this morning and I
15 apologize for the lateness.

16 THE COURT: Yes, I did get that, I've read that.

17 MS. WISSLER: So I won't recite what's written in the
18 memorandum. But what I would like to say about the coercion
19 aspect that's been alleged in this case is two things, and
20 that's first of all, and I think most importantly is there was
21 no dog present at the scene of this incident until after Mr.
22 Allred was in handcuffs and was safely in a patrol car. The
23 dog was not removed from the car until that time and that's by
24 the testimony of the witness that testified here as well today.
25 It isn't as if this dog was pulling on the end of the rope,

1 gnashing his teeth and barking at the time that Mr. Allred made
2 his confession.

3 THE COURT: That's true.

4 MS. WISSLER: And I would further indicate to the
5 Court -

6 THE COURT: That's true.

7 MS. WISSLER: - that upon questioning today, Ms.
8 Ortiz indicated that she recalled the officer saying that if
9 they had any involvement in this marijuana the dog would be
10 able to sniff it out. She made no reference today to any
11 comment about the dog biting anyone and what's important about
12 that, Your Honor, is certainly not to suggest that that comment
13 didn't occur, but rather to suggest that it apparently didn't
14 have much of an impact on Ms. Ortiz because she didn't even
15 testify about it here in Court today. What she said in Court
16 today was that they told her that they were, that they could
17 bring in the dog and that if any of these individuals had any
18 association with this bag the dog would be able to sense it.

19 THE COURT: Well they went -

20 MS. WISSLER: She made no comment about it at all.

21 THE COURT: - farther than that according to the
22 preliminary hearing transcript.

23 MS. WISSLER: And I agree with the Court. What I,
24 what I, and I don't, I don't mean to infer that that comment
25 did not take place, because I believe it did.

1 THE COURT: But she did not [inaudible] -

2 MS. WISSLER: But she did not apparently feel that it
3 was noteworthy or take - or feel that it, it apparently didn't
4 stick in her mind that there was a comment made about the dogs
5 biting someone. And so that's why I believe that under these
6 circumstances this conversation did not play a large part in
7 the statements that were made by Mr. Allred. I think that the
8 memorandum that I filed pretty specifically addresses the
9 issues of the custody status, or lack thereof, with regards to
10 the first statement and also the issue of the subsequent
11 Mirandized statement and so I won't, I won't say too much. I
12 simply want to point out those two things which I think are
13 important to the Court.

14 THE COURT: Do you see any problem with the coercive
15 aspects of the dog, or the reference to the dog? I agree with
16 you the dog was not taken out, so I guess it's in some ways
17 commensurate with a gun that's in the holster and never
18 brandished or used, except that if one were to say look at this
19 gun I've got. Look at this gun I've got, and I can take it out
20 any time I want and I've shot people with it, that puts it in a
21 whole different situation. What they said here was we can get
22 a dog and that maybe we can get a certain dog by a certain name
23 because he's really a mean one, something like that indicating
24 that there are different dogs and some of them are meaner than
25 others and so even though the dog was not there at the time,

1 reference to the dog troubles me.

2 MS. WISSLER: And Your Honor, I, I, to be quite candid
3 with the Court, I've told the officers involved in this case
4 that I would have preferred had this conversation not taken
5 place. But I, because this type of situation arises where
6 these kind of conversations happen. I don't think, however, I
7 discussed this case that there is any indication but for this
8 essentially their claims of coercion. There was no, there was
9 no implicit threat. There was no "if you don't own up to this,
10 this dog's gonna bite you." There was no dog present.

11 THE COURT: Well, I may be disagreeing with you on
12 that one. I just wonder if that's sufficient to make it
13 coercive. Because as you point out the dog was not there.

14 There's another statement, now I'm looking at Page
15 25, "I did mention to Officer Dimond about, well, let's see,
16 yeah I think I mentioned it to him that in the County I had
17 backed the County officer and their dog found drugs in the back
18 side of someone. I guess he put it down his pants and the dog
19 had found it, was sniffing at his back side." Now the only
20 reason to go into this nonsense about a dog nipping at
21 somebody's posterior and a dog being mean and looking for a
22 mean dog and asking for a certain dog by name is coercive.

23 MS. WISSLER: Well and there was actually -

24 THE COURT: Because drugs had already been found.

25 MS. WISSLER: There was actually not a discussion

1 about one dog being meaner than the other.

2 THE COURT: Well now, it was just what I read a
3 moment ago.

4 MS. WISSLER: Right, and I agree with you.

5 THE COURT: I'm on Page 24.

6 MS. WISSLER: Uh-huh (affirmative).

7 THE COURT: "And did you say something to Officer
8 Dimond or did Officer Dimond say something to you about yeah
9 maybe we should get a certain dog by a certain name, he's
10 really a mean one, something like that indicating that there
11 are different dogs and some of them are meaner?"

12 He says, "Well at first we thought about a canine
13 dog, a regular canine dog which sniffs at a, and then we
14 decided the bloodhound, which we recently got on the police
15 department would be better, because he could go off scent and
16 be able to point out which person." So I guess it's
17 questionable whether there was a reference to meaner.

18 MS. WISSLER: And I think that, it's important that
19 you note that, Your Honor, because that's the kind of dog that
20 actually appeared on the scene was a -

21 THE COURT: [inaudible] a canine --

22 MS. WISSLER: Not a drug dog.

23 THE COURT: All right.

24 MS. REMAL: Your Honor, may I just point out-

25 THE COURT: Surely.

1 MS. REMAL: - another statement in that, on that same
2 Page 25, line 9, the question I had asked is do you, "Did you
3 or Officer Dimond say something about one dog being meaner than
4 another? And the answer was "Probably, I think someone did say
5 something. I can't remember if it was me or him that said
6 we've got the canine dogs and they are mean."

7 MRS. WISSLER: But that wasn't the kind of dog that
8 they were discussing bringing.

9 THE COURT: Yes, I understand. It would be nice had
10 that not been said. It would make it such a cleaner case, so
11 much of a cleaner case. I don't think we live in a society
12 where we need to threaten people. I'm going to consider this
13 and if we're going to trial on the 11th I have plenty of time
14 to give you an indication of where I stand on this. I'm
15 telling you, this is not one of those cases where I'm
16 necessarily going to rule that it's not suppressible. I have
17 not determined that it is suppressible, but frankly it's on the
18 line. I don't like the way this is handled, and, you know,
19 I've spent time in Liberty Park myself. I roller blade there.
20 I bike there. I take my daughter there. We picnic there, and
21 if officers had come up to me and had started asking me
22 questions and threaten me with a dog and gone through my
23 personal effects, even though they would not have found drugs,
24 it's kind of a terrifying thing to contemplate and I'm not so
25 sure that the manner in which this is handled is guaranteed to

1 get to the truth in a fair and appropriate manner. I'm going
2 to think about it.

3 Let me ask one more question and you may not know the
4 answer to this. Where was the restroom that the young woman
5 wanted to use in relation to where the picnic table was?

6 MS. REMAL: I didn't ask that question at the
7 preliminary hearing, so I don't know.

8 THE COURT: Do you know?

9 MS. REMAL: Mr. Allred, I think -

10 THE COURT: Mr. Allred?

11 THE DEFENDANT: It was about from where, from where
12 the basketball court is, when you enter, the basketball court,
13 they've got some out, outlet restrooms and they're just about
14 25 yards,, maybe not even that far.

15 THE COURT: Okay. Well I'm going to give this
16 considerable thought. Now I don't know if that changes your
17 decision about going on the 11th, because you're not going to
18 know what my ruling is until you come in on the 5th. I mean
19 I'd be happy to tell you sooner, but we won't be here. So does
20 that change your position on that?

21 MS. REMAL: It certainly makes probably more sense for
22 us to get the Court's ruling before we proceed, and again my
23 only hesitation is -

24 THE COURT: I'll tell you right now, the first
25 statement is not coming in. The statement to Officer Dimond

1 without the Miranda, this bag is mine, is not coming in. So if
2 what we're talking about now is whether the second statement
3 comes in and so that raises questions whether the first
4 statement came, the second statement and as I recall the law on
5 this, there has to be a significant passage of time between the
6 two. They have to be sufficiently attenuated so that there
7 isn't a taint and I'm not sure we've got that. So why don't
8 you visit for a minute with your client.

9 MS. REMAL: Your Honor, do you have any sense of if
10 the worse happens and on the 11th my other case doesn't resolve
11 as I think it likely will, when the date would be after that?

12 THE COURT: Well, I would guarantee because the
13 defendant is in custody that I'd get it on immediately.
14 [inaudible] here.

15 If we could not try this because Ms. Remal is in
16 front of Judge Hansen on the 11th, could we do this on the
17 18th?

18 COURT CLERK: We [inaudible]

19 THE COURT: Okay, what about the 20th? Why couldn't
20 we do it on the 20th?

21 COURT CLERK: [inaudible]

22 THE COURT: What about the 25th?

23 COURT CLERK: We could do it then.

24 THE COURT: We could do it the 25th. So we're in the
25 same month, we're just a few weeks away.

1 MS. REMAL: Your Honor, let me say back to you what I
2 think I hear you saying, and that is that you think that this
3 is an important question that you feel like you need time to
4 consider it carefully.

5 THE COURT: I'll go further. I'll say that I think
6 there is a good chance that if I allow any second statement
7 it'll be overturned on appeal and that's not my concern. My
8 concern is in doing the right thing. But what I mean by
9 referencing an appeal is that I think the case law, and I want
10 to re-read everything and I want to look very closely at Ms.
11 Wissler's Memorandum that she's directly on point on a number
12 of these issues, I'm really concerned about the manner in which
13 this was handled and I think you know me well enough to know
14 that I don't usually say that. I usually say it's suppressed
15 or it's not suppressed. This is one I have not made up my mind
16 on, but there is a very good chance that it will be suppressed.

17 MS. REMAL: I guess my comment has to do with the
18 amount of time that you feel like you need to properly consider
19 it. It seems like what you're saying is that -

20 THE COURT: If the trial goes on Tuesday, then I will
21 do it over the weekend. I'll give it the time it deserves,
22 whether it's my own time or time in the office here. But I
23 think it's an important issue and what I'd like to do, frankly,
24 is not only research it myself and look at it, but also have my
25 law clerk look at it too, because I think it's an important

1 issue and that's not going to happen if we go to trial Tuesday.

2 Ms. Wissler, let me ask you a question and perhaps
3 you could turn to the officer and ask him. What is your
4 understanding of the time differential between Officer Dimond's
5 questioning of the defendant and Officer Evans Miranda and
6 questioning of the Defendant?

7 MS. WISSLER: I don't know, let me ask.

8 MS. REMAL: Your Honor, what I've indicated to Mr.
9 Allred is that I want the Court to have the time to do the
10 research and consider the question carefully, and because of
11 that it's my advice to him that he agree to the 11th date and
12 if my other case doesn't go away like I think it's likely too,
13 that we agree to the date on the 25th.

14 THE COURT: We'll write this down in pencil on both
15 days. But he's assured of one date or the other if it isn't
16 resolved on the, on the motion, and frankly, I feel better
17 about that. I think it's more likely I'll make the correct
18 decision. While you were visiting with your client I put a
19 question to Ms. Wissler. I asked that she confer with her
20 officer if she wished to. I wanted to know what the time
21 differential between conversation A and conversation B with the
22 Miranda was.

23 Recognizing that it's hard to pinpoint these things,
24 do you have an approximate time?

25 MS. WISSLER: Your Honor, the officer indicated that

1 he thinks it was between 15 and 20 minutes. He indicated to me
2 the things that he did in between the time that Mr. Allred was
3 taken in custody and when he approached him again and had
4 mirandized him and then had the rest of that conversation and,
5 and he says he recalls it was between 15 to 20 minutes.

6 THE COURT: Okay, and that was without having talked
7 to his colleague?

8 MS. WISSLER: He indicated to me just now that he
9 went and talked to the third officer who had by then arrived
10 and they were having some discussion, and.-

11 THE COURT: So he talked to the officer with the dog,
12 but did he talk to Officer Dimond?

13 MS. WISSLER: He indicates, Your Honor, that the
14 conversation he had with Officer Dimond regarded what was in
15 the bag, in terms of quantity -

16 [over talking]

17 THE COURT: So he didn't say what the defendant had
18 said to him as you recall, he just said I found marijuana in
19 the bag and then went and visited with the officer with the
20 dog, 15 to 20 minutes passes and he had the conversation with
21 the defendant?

22 MS. WISSLER: Right.

23 THE COURT: All right, well, I'm going to carefully
24 consider this and research the issue. I don't think it's an
25 easy issue. You know, I understand that law enforcement

1 officers, even the very best ones, in circumstances where
2 they're trying to find out information that's important may use
3 a word or a phrase that when we look at in hindsight in the
4 Court seems very different. So I'm not faulting the officers,
5 but I am saying I certainly wish the reference to the dog and
6 the dog's personality had not been made. That troubles me.
7 I'm not as troubled about the lack of Miranda on the first
8 statement. That's just out, and since the same stuff came in
9 on the second statement, it's a question of whether the two
10 were attenuated enough. It bodes well for the State that
11 apparently the two officers that got the two statements didn't
12 do much talking and that there's 15 minutes and so it is not a
13 significant period of time. But there are a lot of issues and
14 I don't know whether this is a product of coercion, but that
15 certainly is a strong possibility.

16 So I will take the time I need. In all likelihood I
17 won't rule for a week. I'll probably have a ruling for you
18 next Friday which means that I'll spend the weekend looking it
19 over, reading the case law and then I'll meet with my law clerk
20 on Tuesday and have her do some additional research and then
21 we'll process it together and do some kind of memorandum or
22 [inaudible].

23 MS. REMAL: Would it be helpful if we set this for
24 pretrial Conference next Friday so that the Court can inform us
25 and then -

1 THE COURT: Sure.

2 MS. REMAL: - I'll by then hopefully know what's

3 happening with my other case so we'll know -

4 THE COURT: I think that's a great idea.

5 MS. REMAL: - what -

6 THE COURT: And you can tell us which of the trial

7 dates you want to use if it's still looking like it's going to

8 trial.

9 MS. REMAL: Okay.

10 THE COURT: And of course, what's going on with me

11 and my thought processes, etc., does not in any way impede

12 counsel visiting and arriving at an agreement. Okay, so next

13 Friday, the 8th and if you're hear first Lisa, we'll do it

14 first at 8:30 in the morning, assuming the jail brings up Mr.

15 Allred in a timely manner, we'll let him be first.

16 Any other issues we need to discuss today?

17 MS. REMAL: I don't believe so.

18 THE COURT: Well, I think that gives you an extension

19 on your instructions, so you can have until Wednesday at five

20 to get the instructions in.

21 MS. REMAL: Okay.

22 THE COURT: Thank you, counsel.

23 Thank you, sir.

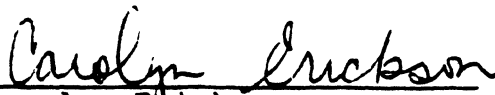
24 (Whereupon the proceedings were concluded.)

25

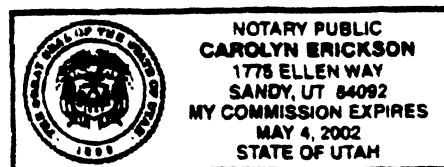
CERTIFICATE

I HEREBY CERTIFY that the foregoing transcript in the before mentioned hearing held before Judge Leslie A. Lewis was transcribed by me from a videotape and is a full, true and correct transcription of the proceedings as set forth in the preceding pages to the best of my ability.

Signed this 25th day of March, 2001 in Sandy, Utah.


Carolyn Erickson
Certified Shorthand Reporter
Certified Court Transcriber

My Commission expires May 4, 2002



Addendum C

IN THE THIRD JUDICIAL DISTRICT COURT
IN AND FOR SALT LAKE COUNTY, STATE OF UTAH

STATE OF UTAH,	:	Case No. 001910371FS
	:	
Plaintiff,	:	
	:	
v	:	
	:	
TRACY MICAH ALLRED,	:	
	:	
Defendant.	:	

RULING ON MOTION TO SUPPRESS HELD SEPTEMBER 8, 2000

BEFORE

THE HONORABLE LESLIE A. LEWIS

FILED DISTRICT COURT
Third Judicial District

MAR 27 2001

SALT LAKE COUNTY

By K. Shupe Deputy Clerk

ORIGINAL

FILED

SEP 23 2001

CAROLYN ERICKSON, CSR
CERTIFIED COURT TRANSCRIBER
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COURT OF APPEALS
20010113-0

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231 East 400 South
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For the Defendant:

LISA J. REMAL
SALT LAKE LEGAL DEFENDERS
424 East 500 South
Salt Lake City, Utah 84111

* * *

1 SALT LAKE CITY, UTAH; SEPTEMBER 8, 2000
2 HONORABLE LESLIE A. LEWIS, JUDGE PRESIDING
3 P R O C E E D I N G S

4 THE COURT: That and we'll do it.

5 MS. REMAL: On the last page, number 1 -

6 THE COURT: And Tracy Allred is the one that we were
7 going to -

8 Would you see if that's on my desk Michelle? That's
9 the one I did some research on.

10 MS. REMAL: Correct, Your Honor.

11 THE COURT: All right, and Ms. Remal, refresh me, who
12 from the State was handling -

13 MS. REMAL: Ms. Wissler.

14 MS. WISSLER: It's me, Your Honor.

15 THE COURT: Who?

16 MS. REMAL: Ms. Wissler, who's here.

17 THE COURT: Ms. Wissler. There she is. All right.
18 I had indicated that I would advise you today of my ruling and
19 then see where that places us and I'm in a position to do that.

20 MS. REMAL: Mr. Allred isn't here, Your Honor.

21 THE COURT: Yes, I remember Mr. Allred. I have
22 looked long and hard at this issue. I've had a law clerk
23 looking at it as well to give me another perspective.

24 Thank you.

25 And have made a determination, having read what I
26 consider to be the important law in this area, and I will just

1 indicate the proposed ruling that the defendant's first
2 statement was obtained in violation and that I would keep it
3 out I'm going to adhere to. I'm not going to allow in the
4 first statement. However, I am going to find that that
5 statement, although in violation of Miranda, because the
6 defendant quite simply had not been Mirandized, was a voluntary
7 statement, wasn't coerced. It wasn't in any way forced. The
8 defendant, who's a very pleasant gentleman, did not register
9 any vehement complaints. The dogs were not there. So I find
10 that that statement was voluntary and there's no constitutional
11 violation. Therefore, the tainted fruit doctrine does not
12 apply or create problems in connection with the second
13 statement.

14 I have looked at the case of *State versus Troyer*, and
15 also *Oregon versus Elstad*, and it's my belief that where there
16 is a Mirandized statement which is made subsequent to a
17 statement obtained in violation of Miranda, the second
18 mirandized statement is nevertheless admissible if the
19 defendant gave the first statement freely and voluntarily. The
20 Court in *Troyer* stated it is an unwarranted extension of
21 Miranda to hold that a simple failure to administer the warning
22 unaccompanied by any actual coercion or other circumstances
23 calculated to undermine the suspects ability to exercise his
24 free will so taints the investigatory process that a subsequent
25 voluntary and informed waiver is ineffective for some

1 indeterminate period.

2 So in this case the Court determines that the police
3 officers comments about the mean dog do not rise to the level
4 of coercion, in fact I call them more sort of inane and
5 ridiculous, although highly improper, and they did not in any
6 way, to this Court's mind, and I base this upon statements of
7 the witness and also the totality of facts and circumstances, I
8 find that they did not in any way overcome the defendant's free
9 will and since the Court finds an absence of coercion or other
10 improper tactics, suppression of the second statement is denied
11 and will be allowed. The first statement is not to be eluded
12 to in any way.

13 I also will talk at some point with counsel present
14 to law enforcement about the stupidity, if you will, of their
15 approach in bringing a dog to the scene and their ridiculous
16 statement about the dog. But to my mind, the statement was not
17 the result of the dog, and the mere fact that he was in a
18 vehicle at the scene at some point, although it's not clear
19 whether that was at a, same time that the statement was made,
20 does not to my mind change anything, and the mere fact that
21 Miranda was not given during the first statement does not taint
22 that statement for the reasons given and both of the cases to
23 which I eluded find the same thing.

24 So the one statement will come in and you can
25 certainly argue, Ms. Remal, that, you know, the reference to
26 the dog and so forth was coercion or whatever else you think is

1 appropriate and knowing how good you are, you'll probably be
2 able to do a lot with the facts. But in any event, that is my
3 ruling and I'm gonna ask the State to do a written ruling
4 commensurate with the oral one I just read into the record.

5 Now this was also to be treated as a pretrial but I
6 don't believe we have a trial date, do we?

7 MS. REMAL: We do for Monday, Your Honor, yes.

8 THE COURT: Monday, okay, and are we going forward on
9 that date?

10 MS. REMAL: Yes.

11 THE COURT: All right, and is there anything I should
12 be aware of in terms of particular issues or problems that
13 we've got in this case?

14 MS. REMAL: The only thing that I'm aware of, Your
15 Honor, let me first check and make sure you got the voir dire
16 and instructions that I sent over. I brought another copy
17 because I know sometimes they don't make it to the file.

18 THE COURT: Well, that was wisdom on your part,
19 because I don't. I'm sure you did bring them knowing you.
20 They have not made their way upstairs. So if both sides had an
21 extra copy, we can copy them and return them to you.

22 MS. REMAL: Your Honor, if I may approach.

23 THE COURT: Thank you, Ms. Remal. Are these extras?

24 MS. REMAL: Yes, those are extras.

25 THE COURT: Do you need them back?

26 MS. REMAL: What, what was sent over was an original

Addendum D

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FILED DISTRICT COURT
Third Judicial District

FEB 15 2001

SALT LAKE COUNTY

By _____ Deputy Clerk

IN THE THIRD DISTRICT COURT, SALT LAKE DEPARTMENT, IN AND FOR
SALT LAKE COUNTY, STATE OF UTAH

THE STATE OF UTAH,)	
)	FINDINGS OF FACT AND
Plaintiff,)	CONCLUSIONS OF LAW
)	
-vs-)	Case No. 001910371
)	
TRACY MICAH ALLRED,)	Judge LESLIE A. LEWIS
)	
Defendant.)	

Defendant's Motion to Suppress Evidence, filed in the above-captioned matter, came before this Court for hearing in the above-entitled matter on September 1, 2000. Defendant was represented by counsel, Lisa Remal of Salt Lake Legal Defenders' Association, and the State was represented by Sirena M. Wissler, Deputy District Attorney for Salt Lake County. The Court, having received and reviewed the memoranda submitted by each party, and having heard evidence and argument, hereby enters the following Findings of Fact and Conclusions of Law.

FINDINGS OF FACT

1. On June 9, 2000, Officers Bruce Evans and Derek Dimond of the Salt Lake City Police Department were on routine patrol in the Liberty Park area of Salt Lake County.

2. The officers' purpose in patrolling that area was to look for gang activity and drug activity.
3. Officers Evans and Dimond were traveling in a marked Salt Lake City Police car.
4. Both officers were in uniform, consisting of black fatigue style pants, black short sleeved collared shirts bearing the words "Salt Lake City Police Gang Unit" in yellow letters on the shirt's back, and black shoes or boots.
5. Both officers were wearing standard issue duty belts, including firearms.
6. As the officers approached the basketball court area of Liberty Park, their attention was drawn to six individuals seated on or near a picnic table.
7. As the officers' car passed, one of the six individuals seated at the table, a person later identified as the defendant stood up and quickly shoved something into his pocket, then turned away from the officers and sat down.
8. The basketball court area of Liberty Park is, and was on June 9, 2000, known to both Officer Evans and Officer Dimond as an area in which narcotics transactions frequently occur.
9. Because of defendant's behavior, the officers stopped their vehicle and approached the six people seated at or near the picnic table.
10. The group of six consisted of three males and three females, one of whom was 17-year old Sonia Ortiz.
11. Officers Evans and Dimond approached the group and inquired as to the group collectively whether they had seen any drug activity in the area, and explained to them the problems that have occurred there.

12. Officer Evans conducted a brief pat down "Terry frisk" of the defendant, because he felt that he needed to make sure that defendant hadn't been concealing a weapon when he was initially observed quickly putting an item into his pocket.
13. The "Terry frisk" revealed no weapons or contraband on defendant's person.
14. During their conversation with the officers, all six people present denied seeing or participating in any drug activity.
15. The conversation continued for a short time. The six persons seated at the table were never told that they were not free to leave, nor did any of those persons make any effort to leave at that time.
16. The officers satisfied themselves that none of the six persons with whom they had spoken were engaged in any illegal activity.
17. The entire exchange between the officers and the six persons at the picnic table lasted between five and ten minutes.
18. As they were about to leave, one of the officers' attentions was drawn to a black briefcase style bag located on the ground at one end of the table. The bag was five to six feet from where the males, including the defendant, were seated, and seemed to Officer Evans to be out of place.
19. Officer Evans picked up the bag and, without opening it, asked all six individuals collectively whether the bag was theirs.
20. All six, including the defendant, responded in the negative.
21. Officer Evans noticed a couple of other people playing basketball, and he inquired of them whether the bag was theirs. They indicated that it was not.

22. Officer Evans checked the area to see whether there was anyone else that could conceivably own the bag, but didn't see anyone else in the area.
23. Officer Dimond then opened the bag looking for identification in an attempt to determine its owner.
24. There was no identification in the bag.
25. Officer Dimond did locate in the bag a couple of car stereos, some stereo faceplates, a few screwdrivers, a flashlight, batteries, and a green leafy substance that appeared to be, and subsequently tested at the Utah State Crime Laboratory to be, Marijuana.
26. The marijuana was packaged in three separate plastic bags.
27. Also in the bag, officers located approximately 82 empty plastic baggies.
28. After the contents of the bag were discovered, the officers took each of the six individuals, including the defendant, aside separately, and asked each one whether he/she knew who owned the black bag.
29. Officer Evans asked each of the six people "can you come over and talk to me," and then asked each whether they knew to whom the bag belonged.
30. These conversations took place 10-15 feet away from the other five people – just far enough away that the officer believed the others could not hear.
31. Each of the six individuals denied knowing to whom the bag belonged.
32. Each of the six individuals ^{was} ~~was~~ free to leave during the time he was conducting the investigation as to ownership of the bag. He indicated, "I had no reason to hold them."

33. Sonia Ortiz, however, at some point asked whether she and her friend might go use the restroom on the other side of the basketball court. Officer Evans denied her request, reasoning that he did not want the two to go together because they would then have an opportunity to discuss the issue of the bag.
34. After each of the six people asked denied knowing to whom the bag belonged, the officers engaged in a conversation between themselves about different ways in which they might determine the bag's owner.
35. During that conversation, conducted within earshot of all six people, the officers considered aloud whether they should call in a K-9 unit.
36. As a part of the discussion about the possibility of a K-9 unit, one of the officers made a comment about some of the police dogs being meaner than others.
37. Officer Evans remarked that Salt Lake County had a dog that had nipped at a suspects' backside because the dog had alerted on drugs located in the suspect's pants.
38. The officers never indicated to any person that a dog would bite them if they turned out to be the owner of the bag.
39. ~~There was no~~ police dog present at the scene during the conversation about ~~the bag~~
40. ~~Defendant then~~ indicated to Officer Dimond that the bag belonged to him.
41. Defendant was then placed under arrest, and Officer Evans read defendant his Miranda rights.

42. Post-Miranda, defendant described to Officer Evans the contents of the bag, and the origin of those items. He indicated, among other things, that the green leafy substance inside the bag was marijuana and that he had been selling marijuana because he could not get a job.
43. Sometime around the time that defendant was arrested, Officer Serio arrived at the scene with a police dog.
44. Officer Serio was driving a marked Salt Lake City Police car that did not bear any markings identifying it as a K-9 unit.

CONCLUSIONS OF LAW

1. Defendant's initial statement to Officer Dimond, in which defendant admitted to ownership of the black bag, was made without benefit of the Miranda warnings, and is thus inadmissible at trial.
2. However, defendant's initial statement admitting ownership, while violative of Miranda, was made voluntarily and was not the product of coercion. In the absence of such coercion on the part of law enforcement, there is no violation of the Fifth Amendment of the United States Constitution and the "fruit of the poison tree" doctrine does not apply.
3. Defendant's post-Miranda statements are admissible pursuant to the principles announced in Oregon v. Elstad, 470 U.S. 298 (1985) and State v. Trover, 910 P.2d 1182 (Utah 1995). Specifically, the Court has examined whether "a simple failure to administer the warnings, unaccompanied by any actual coercion or other circumstances calculated to undermine the suspect's ability to exercise his free will, so taints the investigatory process that a subsequent voluntary and informed waiver is

ineffective for some indeterminate period.” Troyer, 910 P.2d at 1189 (quoting Elstad, 470 U.S. at 309).

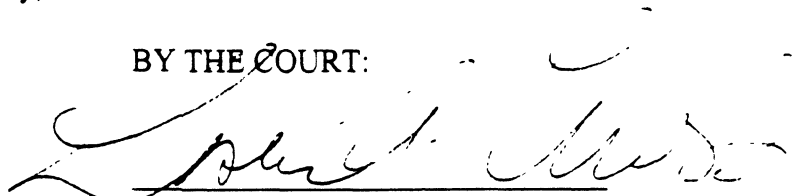
4. In the instant case, although defendant’s initial statement was made without benefit of Miranda warnings, it was unaccompanied by actual coercion. Therefore, the absence of Miranda prior to the initial statement does not sufficiently taint the investigatory process so as to render ineffective the subsequent waiver.

5. The defendant made a voluntary and informed waiver of his Miranda rights before making the second statement.

6. Therefore, the Court concludes that the defendant’s Motion to Suppress is granted with respect to his initial, pre-Miranda statement admitting ownership of the black bag in question, and denied as to defendant’s post-Miranda statements reaffirming ownership and describing the contents of the bag.

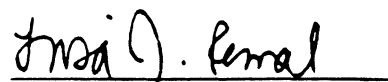
DATED this 10th day of January, 2001.

BY THE COURT:



Honorable LESLIE A. LEWIS

Read and approved as to form by:


LISA REMAL
Attorney for Defendant

Addendum E

00-9-0M7-

IN THE THIRD JUDICIAL DISTRICT COURT
IN AND FOR SALT LAKE COUNTY, STATE OF UTAH

STATE OF UTAH,	:	Case No. 001910371FS
	:	
Plaintiff,	:	
	:	Volume I of II
v	:	
	:	
TRACY MICAH ALLRED,	:	
	:	
Defendant.	:	

JURY TRIAL HELD SEPTEMBER 11 & 12, 2000

BEFORE

THE HONORABLE LESLIE A. LEWIS

FILED DISTRICT COURT
Third Judicial District

MAR 27 2001

SALT LAKE COUNTY
By K. Shupe Deputy Clerk

ORIGINAL

FILED

CAROLYN ERICKSON, CSR
CERTIFIED COURT TRANSCRIBER

APR 23 2001

1775 E. Ellen Way
Sandy, Utah 84092
801-523-1186

COURT OF APPEALS
20010113-a

1 THE COURT: Okay, all right, fair enough.
2 Incidentally, Ms. Wissler, do you see any family members on a
3 jury list, or anyone

4 MS. WISSLER: I don't have any family in Utah.

5 THE COURT: Anyone you know on a jury list?

6 MS. WISSLER: No, nope. I looked and I don't
7 recognize anybody.

8 MS. REMAL: Sorry about the clothing snafu, but, but
9 you look good.

10 THE COURT: Yes, Michelle is about to give us an
11 update on which jurors are not present and, Chris, do you want
12 to go get the jurors, bring them up and keep them in that
13 little area between the glass and the other door as quickly as
14 possible.

15 COURT CLERK: Number 4, Cooper, was on her way so she
16 should be down there by now.

17 MS. REMAL: Okay.

18 COURT CLERK: Number 12, Mark Kilter, is not here and
19 number 26, Elizabeth Swenson, is not here.

20 THE COURT: Well, that's a pretty good turn out.

21 MS. REMAL: Your Honor, there is one matter that I
22 think we need to put on the record that Ms. Wissler and I have
23 agreed to, but just so that the Court's aware of it. As the
24 Court is I'm sure aware from our Motion hearing, the bag in
25 question contained what appears to be marijuana and ultimately

1 was tested to be, as well as some other property which included
2 car stereos and face plates from stereos. It's my
3 understanding that Ms. Wissler has instructed her witnesses -

4 THE COURT: Not to allude -

5 MS. REMAL: - not to mention specifically what they
6 are. I think what she's planning to do was simply ask them did
7 Mr. Allred explain the other property or, but not go into what
8 the property is or not go into what specifically what Mr.
9 Allred said about the other property.

10 THE COURT: Certainly seems like an appropriate way to
11 handle it. Is that your intention Ms. Allred [sic].

12 MS. WISSLER: It is.

13 THE COURT: Ms. Allred - Ms. Wissler?

14 MS. WISSLER: It is.

15 THE COURT: I wonder how many times I'll screw up
16 today.

17 MS. WISSLER: And I did talk to them about that.

18 THE COURT: All right, and if you would, if you feel
19 like you've got any police officers who are less likely to
20 follow instruction, your instincts will tell you then tell them
21 again, and if we get into a situation where it sounds like
22 we're going to say something stupid, raise your hand, stand up
23 and say may I have just a moment, Your Honor, and that would be
24 better than having a mistrial.

25 MS. WISSLER: We actually did address that at the

1 A Correct.

2 Q So what do you do with the bag then?

3 A I took a look inside to see if we could find any kind
4 of identification, anything like that, and located some, some
5 marijuana, quite a bit large quantity -

6 Q Okay, let me -

7 MS. REMAL: Objection, foundation, Your Honor.

8 MS. WISSLER: Let me stop you there.

9 THE COURT: The objection is sustained.

10 MS. REMAL: Thank you, Your Honor.

11 Q (BY MS. WISSLER) When you looked in this black bag,
12 initially what was the first thing you saw?

13 A There was, there was some car stereos inside the bag.
14 There was a baggie of marijuana.

15 Q Okay, stop you there. What did this baggie look
16 like?

17 MS. REMAL: Your Honor, I'd object on foundation.
18 Certainly I believe the officer could describe what he saw, but
19 I believe his conclusion -

20 THE WITNESS: I understand.

21 THE COURT: Just, just a moment please.

22 MS. REMAL: - he can't draw based on his lack of
23 expertise.

24 THE COURT: So at this point, Ms. Wissler, phrase the
25 question, which I think you did, but even more clearly, calling

1 Dimond, you know, we don't know who this bag is. We'd better,
2 you know, see if we can find something so we can return it to
3 the owner.

4 Q Okay, and at some point Officer Dimond opened the
5 bag, is that right?

6 A That's right.

7 Q Did you have occasion to observe the contents of that
8 bag?

9 A I did at a later time.

10 Q Okay, how long after?

11 A I'm not sure. I believe it was close to the point.
12 I think it was after we had made the arrest or close to the
13 point where we made the arrest.

14 Q Okay, when you looked into that bag what did you
15 observe?

16 A I observed a couple stereos, couple, some tools. I
17 observed a couple baggies with green leafy substance inside.

18 Q Okay, when you say a couple, do you remember exactly
19 how many there were?

20 A There were two, two larger plastic baggies rolled up
21 and then there was three smaller, smaller baggies that
22 contained mar, -

23 Q Okay, was there anything else?

24 A - green leafy substance.

25 Q Sorry, didn't mean to interrupt you. Was there

1 anything else in that large black bag?

2 A And then there was a whole bunch of empty baggies.

3 Q How many is a whole bunch do you remember?

4 A Eighty, I think around 82.

5 Q Okay. So what did you do after you opened this black
6 bag and found all this stuff?

7 A Well, we asked, we, we questioned, asked the six
8 individuals, you know, did you see anybody with this bag? Do
9 you know who this bag belongs to? I actually pulled each
10 person aside and said, Hey, can you come talk to me for a
11 minute? Asked them did you see who had this bag? Did you see
12 anybody holding this bag? I went through all six and everybody
13 said no.

14 Q Okay, did any of these individuals ever make an
15 attempt to walk away from the table?

16 A No.

17 Q Did any of them indicate to you that they didn't want
18 to talk to you?

19 A No.

20 Q Okay. Did any of them admit to owning the bag?

21 A No.

22 Q Okay. Now at some point after some conversation and
23 some further investigation, did you have occasion to arrest Mr.
24 Allred for the contents of this black bag?

25 A We did.

1 Q Okay. Can you indicate please who placed Mr. Allred
2 arrest?

3 A I can't remember, we were both together and I can't
4 remember, Officer Dimond was talking and I can't remember if
5 he, if he did it. I believe he might have.

6 Q Okay.

7 A I'm not sure.

8 Q Did you, after he was arrested, have a conversation
9 with Mr. Allred?

10 A I did.

11 Q Do you recall whether he was handcuffed when you
12 initially made contact with him after his arrest?

13 A I can't remember, I think he was.

14 Q You think he was handcuffed?

15 A Yeah, I think he was handcuffed.

16 Q Okay, and what was the first thing that you did when
17 you approached Mr. Allred?

18 A Umm.

19 Q After he had been placed under arrest?

20 A After he'd been placed? I just told him I wanted to
21 ask him a few questions and I asked him if he had ever been
22 read his Miranda rights. He said yes.

23 Q Okay.

24 A I said do you understand those? He said yes. Then I
25 went through and explained what his rights were and asked if he

1 would like to talk to me.

2 Q And what did he tell you when you asked if he wanted
3 to talk to you?

4 A He said he would.

5 Q He said he would? Did you ask him specifically about
6 the black bag?

7 A I did.

8 Q What did he tell you about that bag?

9 A He said the bag was his.

10 Q Did he tell you anything specific about the green
11 leafy substance that we've been discussing today?

12 A Yes.

13 Q What did he tell you about that?

14 A He said that he had been selling marijuana for
15 approximately two months in the park. He says he sells the
16 marijuana because he's had a hard time finding work.

17 Q Did you have any conversation about the other items
18 in that black bag?

19 A I did.

20 Q And did Mr. Allred tell you anything about the origin
21 of those items?

22 A He didn't.

23 Q Okay. Now you wear a gun as part of your uniform as
24 does Officer Dimond, right?

25 A Yes.

1 THE COURT: Okay.

2 MS. REMAL: We know what we need to talk about -

3 THE COURT: Why don't you do that? Where would it be
4 most pleasant for you to talk to him. Would you like us to
5 step out?

6 MS. REMAL: We can talk [inaudible] -

7 THE COURT: All right.

8 MS. REMAL: Your Honor, there is another matter that
9 I'd like to make a record about, and that is, Your Honor, that
10 I'm moving for a mistrial on two grounds.

11 You can sit down. [inaudible]

12 Your Honor, it was my understanding of the
13 stipulation between the State and myself this morning that we
14 placed on the record, that the State's witnesses were not going
15 to bring to the jury's attention the fact that there were car
16 stereos in the bag, State's Exhibit 1, and it's my recollection
17 that both Officer Dimond and Officer Evans did, in fact,
18 mention those. Although they did not specify anything about
19 Mr. Allred's statement in regard to those. I believe that's in
20 violation of our stipulation and, and further the stipulation
21 in my view at least was based on the fact that that's an
22 indication of some prior or other bad acts which I believe is
23 prohibited by Rule 404 and that was my reason for speaking with
24 Ms. Wissler about it.

25 Secondly, Your Honor, I would move for a mistrial

1 based on the second ground and that is in Officer Evans'
2 testimony it was my recollection that he said when he was
3 describing Mr. Allred's being mirandized that Mr. - that
4 Officer Evans testified he asked Mr. Allred have you ever been
5 mirandized before. Mr. Allred said, yes, and Officer Evans
6 then followed up and something like so you understand what this
7 means.

8 THE COURT: Oh.

9 MS. REMAL: My objection to that, Your Honor, is that
10 makes it clear that Mr. Allred -

11 THE COURT: I did not hear that.

12 MS. REMAL: - has been arrested before.

13 THE COURT: If that's what was said -

14 MS. WISSLER: And Your Honor I do -

15 THE COURT: Surely that was not said.

16 MS. WISSLER: - I recall that testimony and in fact
17 that was the reference. I would note, however, that there was
18 no timely objection and there was no motion to strike.

19 THE COURT: That's true. There was no motion to
20 strike, no ability to clarify it because of that -

21 MS. REMAL: And, Your Honor, may I respond to that?
22 I intentionally did not object because if I objected, that's
23 just going to bring it to the jury's attention even more.

24 THE COURT: Well, I understand it's strategic.

25 MS. REMAL: I tactically decided to make a motion for

1 mistrial based on the testimony rather than take the chance of
2 bringing -

3 THE COURT: I understand that it's -

4 MS. REMAL: - further attention to it.

5 THE COURT: - strategic. The problem is that when
6 you make that strategic determination and don't raise the
7 issue, and certainly you don't raise it in front of the jury
8 anyway, you say you need a brief recess and, in fact, we did
9 take a recess around that time. You call it to my attention
10 and there are a number of ways in which it can be handled by my
11 making some kind of curative statement. It is, however, an
12 incredibly stupid thing to have said and I missed it, which is
13 the only good thing, because if I missed it, perhaps the jury
14 did as well.

15 Do you remember precisely what was said and precisely
16 what the response was?

17 MS. REMAL: As best I recall, Your Honor, it was when
18 Officer Evans was describing the Mirandizing of Mr. Allred and
19 I believe -

20 THE COURT: Oh.

21 MS. REMAL: - he said as best I recall I asked Mr.
22 Allred or the defendant if he had been mirandized before and he
23 said yes and I said to him then you understand what it means -

24 THE COURT: All right.

25 MS. REMAL: That's the gist that I recall.

1 THE COURT: Okay, I don't think then it's the problem
2 that I initially saw it to be. I know unfortunately what
3 Officer Evans meant and you know what Officer Evans meant. But
4 the jury has no way of knowing what Officer Evans meant and he
5 could have meant were you Mirandized a few minutes ago. It
6 does not necessarily allude to or reference another time and
7 another crime. He doesn't say were you Mirandized on another
8 case. Have you ever been arrested before? Have you ever been
9 charged with a crime before? He just says have you been
10 Mirandized before -

11 MS. REMAL: Before.

12 THE COURT: Which could have been -

13 MS. REMAL: That's what I recall.

14 THE COURT: - in the last 15 minutes. Now we know
15 that there was no prior Miranda, but the jury has no way of
16 knowing that, and I would be willing to say to the jury that
17 when, I'll make some kind of curative statement if you'd like
18 me to. But I am inclined to deny the motion for a mistrial.

19 MS. REMAL: Your Honor, it would not be my request
20 that the Court make any sort of curative statement. In my
21 view, if any or all of the jurors did not notice that
22 statement, then that would simply bring it to their attention
23 and I'm, I'm concerned about that happening and frankly -

24 THE COURT: What about a statement like this, Ms.
25 Remal, and excuse me for interrupting. I should have let you

1 finish. I understand your point and it's well taken. What
2 about if I were merely to say at an appropriate point in time,
3 incidentally we use a lot of words in court like preliminary
4 hearings and Miranda, words that we in the legal system know
5 the meaning of and you may not know the meaning of. Just so
6 you understand Miranda are the rights that are given by a law
7 enforcement officer, typically on a card, and they talk about
8 you have the right to remain silent, etc., and it's frequently
9 a situation where one officer with another officer may do the
10 Mirandizing and the other officer may not and they'll check to
11 see if one has, has given the Miranda rights to the defendant.
12 It being generic like that does not misrepresent the facts.
13 Because that is certainly something that happens where one
14 officer will ask if a suspect has been Mirandized by his
15 partner, or the other officer there.

16 I don't know if that helps or hurts. But I offer it
17 as a possible solution and I can give it in the context that a
18 broader description of some legal terms so that it doesn't
19 sound like we're just pulling out one concept and one term and
20 drawing attention to it and I'd be happy to do that.

21 MR. ?: Your Honor, perhaps I could be of assistance.
22 I have a fresh set of years, I'm not in here as much. His
23 exact words were have you ever had your rights read to you
24 before. He did not use the term mirandize. He just said have
25 you ever had your rights read to you.

1 THE COURT: Uh-huh (affirmative), I don't know that
2 that, thank you, I don't know that that makes any difference.
3 The rights referred to are Miranda rights. I don't think
4 anyone could assume they're anything else. Do you?

5 MS. REMAL: I believe that most people in our
6 community are fully aware of what Miranda rights are.

7 THE COURT: Yes. I know.

8 MS. REMAL: And I, I think that as soon as that word
9 is said they, they understand that concept.

10 THE COURT: The reason I would be mentioning it is
11 not because they don't understand the term, but in order to
12 have an opportunity to set the stage for going into this
13 business about how when officers work as a team and one does
14 one thing and one does another, sometimes they may ask the
15 suspect, "Has that already been taken care of?" So that it
16 seems more innocuous.

17 I offer it as a possibility and that may be one of
18 the other things you want to discuss with the defendant.

19 MS. REMAL: I think I would, Your Honor, if we could
20 have a few minutes to do that.

21 THE COURT: How much time would you like? You may
22 have as much time as you wish.

23 MS. REMAL: I think we just need 10 minutes or less.

24 THE COURT: All right.

25 MS. WISSLER: I'm sorry, are you prepared to rule on

1 Ms. Remal's other motion for mistrial or would you like me to
2 respond to that with regard to [inaudible] -

3 THE COURT: Well, I've already denied the motion for
4 a mistrial.

5 MS. WISSLER: Based upon the stipulation?

6 THE COURT: What stipulation -

7 MS. REMAL: About the stereo -

8 THE COURT: Oh, I hadn't gone into that. Do you want
9 to speak about the stereo?

10 MS. WISSLER: I did. Just briefly, Your Honor. My,
11 my understanding of the stipulation and the stipulation that I
12 believed I entered into was that I would not ask the officers,
13 nor would they testify about the statements Mr. Allred made
14 with respect to the origin of the stuff in the bags,
15 specifically the car stereos were stolen, and I didn't ask them
16 that and they didn't testify to that. I don't believe it was
17 ever a part of the stipulation that we would ever hide what was
18 in the bag or that we would not discuss the other items that
19 were in the bag besides the marijuana.

20 My, my understanding of the stipulation was that I
21 would not ask the officers and they would not testify as to Mr.
22 Allred's statement that the stereos had been stolen.

23 THE COURT: That was my understanding that there
24 would be no lengthy discussion of the stereos, that what would
25 occur would be a brief description of what was seen in the

1 black bag, that there would be absolutely no inference or
2 follow-up on the potential source of the stereos.

3 So I'm going to deny the motion for mistrial on that,
4 and in closing, the State may not allude to it. The defense,
5 however, may allude to it. If there's some way that you think
6 it can help you and you can clean it up because the best thing,
7 the best possibility - and I remember this vividly - the
8 stipulation, I should have on my own motion probably ruled that
9 the stereo heads or whatever they were, were not even to be
10 referenced as having been in the bag. But that was not the
11 stipulation as I recall it. There was no reason for it to be
12 discussed and consequently, it would have been cleaner had it
13 not been, but I see no violation in the stipulation.

14 MS. WISSLER: Your Honor?

15 THE COURT: Yes?

16 MS. WISSLER: Your Honor, just for clarification, I
17 did make reference to the fact in my opening argument and/or
18 statement and planned to in my closing argument the fact simply
19 that Mr. Allred gave some indication to the officers of where
20 the property came from. I would make mention of any part of
21 what you said, but I believe that that's relevant to this case-

22 THE COURT: Where what property came from?

23 MS. WISSLER: The stereos, the remainder of the
24 property in the bag.

25 THE COURT: And what did he say about it?

1 MS. WISSLER: He, he told the officers that the
2 stereos were stolen and specifically that he had stolen them.

3 THE COURT: But that is the subject of the
4 stipulation.

5 MS. WISSLER: I understand that. What I'm trying to
6 clarify with Your Honor, is you just prohibited me from making
7 any reference to it, and what I'm asking is may I, in my
8 closing argument, argue to the jury that his comments to the
9 officer about his knowledge of what was in the bag is evidence
10 of the fact that the bag was his. If he didn't know what was
11 in -

12 THE COURT: Well you may say that.

13 MS. WISSLER: Okay. That's all I -

14 THE COURT: You may, without alluding to the stereo -

15 MS. WISSLER: Okay.

16 THE COURT: You may say that Mr. Allred made
17 reference to what items were in the bag, described a few of the
18 different things and by his description it was clear that he
19 had seen the inner contents of the bag.

20 MS. WISSLER: Okay, that's all I wanted.

21 THE COURT: But no reference -

22 MS. WISSLER: No.

23 THE COURT: - to stereo.

24 MS. WISSLER: I'm not even going to mention that
25 word.

1 THE COURT: Okay. Yeah the word should never have
2 been mentioned.

3 MS. WISSLER: No, not going to talk about it.

4 THE COURT: As to the issue of the, the other, that
5 is to say have your rights ever been read to you before, do you
6 want to speak to that issue?

7 MS. WISSLER: Judge, only to say that I would be
8 happy to try and clean that up in my closing argument and just
9 brush it, gloss over it and say as an abundance of caution he
10 Mirandized him, not knowing whether another officer had
11 Mirandized him or not and so he then read his rights and this
12 is what happened after that.

13 THE COURT: Well, I think that's one way of handling
14 it.

15 And Ms. Remal, I'll ask you to consider that as well.
16 I'm also happy to try and do it in some way that's innocuous.
17 The way in which it was mentioned, and I will view the
18 videotape again tonight, sounds like it does not imply that
19 he's ever been arrested before or ever been in trouble before,
20 but because there are more than one, because there were more
21 than one police, there was more than one police officer present
22 he could well have been asking did the other officer Mirandize
23 you. Of course, those are not the exact words and, of course,
24 I would be delighted if we didn't have this issue to deal with.
25 It was extraordinarily stupid statement and I would give

1 anything had it not been made. Especially in view of the fact
2 that we had lengthy argument on the very issue of whether we
3 could use the first statement because there had been no
4 Miranda, versus the second statement where there had been. But
5 the jury does not know that. So the statement on its face to a
6 juror listening to it, in my opinion, is innocuous, does not
7 imply a prior criminal record and certainly I will do anything
8 to cure that and I will not allow anyone to imply that it has
9 anything to do with a prior criminal record, and there's not
10 going to be any testimony about priors.

11 So Ms. Wissler could allude to it in her closing.

12 You can allude to it, if you wish to Ms. Remal, in
13 your closing. I'm happy to give a curative instruction
14 describing what Miranda is and that frequently one officer will
15 do the Mirandizing and the other will not and they're not
16 certain who has done it. Because while that is not what
17 happened here, that is still a true and accurate statement.

18 So, those are the possibilities, but I'm not going to
19 mis-try it and the main reason is that the manner in which it
20 was stated does not imply to the average person listening any
21 prior problems with the law. It is neutral in that respect.
22 It certainly could connote the other to a sophisticated person
23 in the legal environment and for that reason I wish the
24 statement had not been made. But I think to the average lay
25 person it does not have that connotation.

1 Having said that, let me give you some time to talk,
2 as much time as you need.

3 MS. REMAL: Thank you, Your Honor.

4 [Whereupon a recess was taken]

5 MS. REMAL: Mr. Allred is not going to testify. We
6 have, as I indicated, discussed that earlier and, and discussed
7 that again briefly today and that is both of our decision.

8 Secondly, we would like the Court to make a statement
9 to the jurors such as you suggested before about the reading of
10 rights and indicating that sometimes officers will check with a
11 person and see if one of the officers have, have read the
12 rights or not to, to have that information before they do that,
13 or, you put it in a lot better that I did -

14 MS. WISSLER: And Judge, if you would like to
15 reference the fact that I neglected to ask Officer Evans if he
16 had had a conversation with Officer Dimond about that issue,
17 I'm happy to have you do that. If you just want to tell them
18 that I neglected to ask Officer Dimond, Did you guys have a
19 conversation about whether or not he'd been read his Miranda
20 rights? And just to clarify that, that Officer Evans, would,
21 however you want to handle it. But if you'd like to approach
22 it that way, I'm happy to have you do that.

23 THE COURT: Ms. Remal, would you like me to handle it
24 that way?

25 MS. REMAL: I think I'd prefer rather than have you

1 reference any particular testimony, just to sort of make the
2 more general statement that you had suggested -

3 THE COURT: About legal terms?

4 MS. REMAL: Yeah.

5 THE COURT: All right, now given the time of day and
6 the fact that Mr. Allred is not testifying, we don't have Mr.
7 Dimond at the moment, we will in the morning, I'd suggest that
8 we bring the jury in. I'll make a statement of that sort and
9 then we'll excuse them and we'll talk for a few minutes about
10 instructions. Does that sound all right?

11 MS. REMAL: That sounds good.

12 THE COURT: All right, let's bring them in.

13 How long has Mr. Evans been a police officer?

14 MS. WISSLER: Four and a half years.

15 THE COURT: Has there been any reference in this case
16 to a preliminary hearing transcript, or anything of that
17 nature?

18 MS. WISSLER: I don't believe so.

19 MS. REMAL: Not as far as I can recall. In fact,
20 there hadn't been.

21 [Whereupon the jury entered the courtroom]

22 BAILIFF: All rise. The Court is now in session.

23 THE COURT: All right, you may all be seated. Ladies
24 and gentlemen, there are times throughout the trial where we
25 handle matters, and frankly it saves a lot of time, out of your

1 presence and they all involve not facts but legal matters and
2 go over things and that's what we did and so sorry if the last
3 break took a few more minutes than we anticipated. But we made
4 good headway, and in fact we're almost done with the evidence
5 in this case.

6 In occurred to me while I had you out there waiting
7 and while counsel was visiting about a couple of the legal
8 points that there are a lot of terms that we use when we do a
9 trial and even though I'm sure all of you have degrees or
10 college, we've got a very bright jury here, even so and even
11 given that on t.v. now you hear a lot about the legal system.
12 For some reason they find it more fascinating than those of us
13 involved in it do. But even so, there are a lot of terms that
14 are kind of alien or unknown to many lay people and I just
15 wanted to allude to that.

16 Chain is one of those terms. Obviously, you know, if
17 you have a chain around your wrist that's different than what
18 was being discussed in here. Chain is a link from one person
19 who has control of evidence to the next person who has control,
20 and that's a legal term that I just wanted to make sure you
21 understood.

22 We've talked about burden of proof and I'll talk
23 about that more in the instructions that I give you on the law,
24 and proof beyond a reasonable doubt, which is the standard in
25 any criminal case, and I'll define that at some length, because

1 it's a concept that we grapple with and that is very important.
2 So these are terms that you hear and hopefully you won't find
3 them confusing.

4 We also referenced Miranda and I think most of you
5 have probably heard about Miranda. It's been in effect now
6 about 50 years actually. But Miranda, just so you know, is
7 something that occurs frequently in an investigation when a
8 police officer or police officers are talking to someone and
9 they want to get information and they want to put the person on
10 notice, as they should, that the person's statements may come
11 back and may be used in court and that they have the right to a
12 lawyer, etc., etc.

13 Now in this case there was a reference to Miranda
14 which was given and one officer was not sure whether another
15 officer had given it. The Miranda rights, now you know what we
16 were referring to if you didn't before.

17 So as we go through the trial if I hear a term such
18 as that, or it appears that there's something like chain that
19 may not be clear in the manner of its usage, while it's an
20 ordinary word, we may stop and just visit about that briefly as
21 we just did, and in the instructions that I give you on the law
22 there will be considerable help in terms of defining terms, the
23 burden of proof, etc.

24 One of the other things we tell you throughout the
25 trial because it's so important is the defendant in a criminal

1 case is presumed to be innocent and these are important rights
2 and the other concepts are very important and so they're
3 reduced to what we call legal instructions and I will read
4 those when the trial is over. There are about 30 of them, but
5 they're short, they don't take very long and then you'll take
6 them with you into the jury room and hopefully all the
7 questions I haven't answered about terms and what not will
8 become clear as you look at those.

9 Now, Ms. Wissler, tells me that she has one more
10 short witness and that's Officer Dimond, who's she's going to
11 call to the stand briefly as I understand it first thing in the
12 morning and Ms. Remal has one brief witness who she will be
13 calling in the morning.

14 We could start at 8:30 or nine based upon your
15 preference. My guess is and I am guessing, we're not going to
16 have more than 30 minutes of testimony or 45 minutes maximum.

17 Do you think that's a fair statement?

18 MS. REMAL: I think that's fair.

19 THE COURT: And then after that bit of testimony, I
20 will instruct you on the law. That takes about 30 minutes, and
21 then you'll hear closing arguments from counsel.

22 How long do you each anticipate or guess it will take
23 you on your closing?

24 MS. REMAL: I would guess, Your Honor, no more than
25 20 minutes and very likely not that long.

1 THE COURT: Ms. Wissler?

2 MS. WISSLER: I don't, I would probably concur with
3 that, 15, 20 minutes.

4 THE COURT: All right, so it will be a mornings worth
5 of work, but certainly no more, and what we will have you do
6 when you come in at the time we're about to agree on, is order
7 your lunch. We get the lunches from Skool Lunch, which does a
8 really good job and you can order dessert and a beverage and a
9 sandwich, or whatever, soup, salad, whatever is available, and
10 then by the time you go out to deliberate in the jury room,
11 you'll have something good to eat. I wish we could buy you all
12 steak dinners, but this is as good as it gets, and that way we
13 can make an efficient use of our time hopefully.

14 Would you rather come in at 9:00 or 8:30. Those in
15 favor of 9:00 raise their hands. Four, it's pretty close here.
16 Those in favor of 8:30 raise your hand. Five. Okay, how about
17 8:45. We're splitting the difference. We'll see you at 8:45
18 in the morning. When you come in Chris will be here waiting
19 for you and we'll have a menu from Skool Lunch for each of you
20 where you circle those items that you want. Then by the time
21 you're ready to sit down and deliberate, your lunches will be
22 here.

23 I want to tell you that there are times as a Judge
24 when I get a little discouraged, because I look at the jurors
25 and I think do they know how important their job is? Do they

1 know how important it is to make weighty decisions, which of
2 course in my job I have to make all day, every day, and I have
3 been so impressed with each of you and how conscientious and
4 attentive you have been throughout. I just want to tell you
5 there isn't one of you who has drifted off. I know it's a
6 little hot in here even. There isn't one of you who hasn't
7 taken notes and paid very careful attention and it says a lot
8 about each of you and it says a lot about how the system works,
9 and I just wanted to thank you for that.

10 Someone once said a jury is the conscience of the
11 community and as I look at each of you I know that is true, and
12 my friend, the alternate, Mr. Noble, I want you to order lunch.
13 We, we don't know whether you'll be eating with the other
14 jurors, but you'll be eating, and so we'll see how it goes
15 tomorrow and I look forward to seeing each of you in the
16 morning at 8:45. Any questions? Yes.

17 JUROR ?: Is that here or in the jury room?

18 THE COURT: In the jury room, and then Chris will
19 bring you in here, you know, five minutes or so after you get
20 here, and remember don't watch the news tonight. Consider it
21 giving you a little break from the war in the middle east and
22 all of the other things going on in the world that sometimes
23 we'd rather not know about. And don't look at the newspapers.
24 While it is my perception that this is not a high profile case,
25 again you never know. There may be articles treating generic

1 issues that relate to this case and so I'm just going to ask
2 you not to read anything except your sports and your
3 entertainment, okay? Again, thank you and I know counsel
4 shares my appreciation, and we'll see you in the morning.

5 [Whereupon the jury left the courtroom]

6 THE COURT: Thank you [inaudible] exhibits.

7 MS. WISSLER: May I?

8 THE COURT: Yes, thank you Sirena. Everybody may sit
9 down. Well, I did not notice as I spoke that any of the jurors
10 seemed to think that the conversation was out of the ordinary.
11 I don't think I highlighted any particular aspect. At least I
12 tried not to by beginning with a discussion of chain and
13 talking about burden of proof and Miranda. So I'm hopeful that
14 if the jury heard that it cleaned it up and they're well aware
15 that when two officers work together one may Mirandize a
16 suspect and another not and they're never clear.

17 I want you to know, Mr. Allred, how important it is
18 to me that you get a fair trial. I feel very strongly about
19 it, and I want you to know that I've given this a lot of
20 thought and that in the way I phrased it I tried to put it in
21 such a manner that the jury would not emphasize it or even
22 consider it and I hope that when this is over regardless of the
23 verdict you will feel like you've had a fair trial and that at
24 least that has been my concern and my hope and that I have
25 worked to that end. Do you have any questions?

Addendum F

IN THE THIRD JUDICIAL DISTRICT COURT
IN AND FOR SALT LAKE COUNTY, STATE OF UTAH

STATE OF UTAH,	:	Case No. 001910371FS
	:	
Plaintiff,	:	
	:	Volume II of II
v	:	
	:	
TRACY MICAH ALLRED,	:	
	:	
Defendant.	:	

JURY TRIAL HELD SEPTEMBER 11 & 12, 2000

BEFORE

THE HONORABLE LESLIE A. LEWIS

FILED DISTRICT COURT
Third Judicial District

MAR 27 2001

SALT LAKE COUNTY

By K. Shupe Deputy Clerk

ORIGINAL

FILED

APR 23 2001

CAROLYN ERICKSON, CSR
CERTIFIED COURT TRANSCRIBER

1775 E. Ellen Way
Sandy, Utah 84092
801-523-1186

COURT OF APPEALS

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SONYA ORTIZ

having been duly sworn, testified
upon her oath as follows:

Direct Examination

THE COURT: Thank you Ms. Remal.

And Ms. Ortiz, it's important that you lean into the mic and speak as loudly as you can.

DIRECT EXAMINATION

BY MS. REMAL:

Q Sonja, would you just state your name for us and
1 your last name?

A Okay. Sonja Ortiz. O-R-T-I-Z.

Q Sonja, where do you live?

A On -

THE COURT: Miss Remal, could you just get a spelling on the first name as well -

MS. REMAL: Sure.

THE COURT: - since there are a couple of alternates?

Q (BY MS. REMAL) Sure, spell your first name for us also.

A Okay, S-O-N-Y-A.

Q Where do you live, Sonya?

A On 1749 South 900 East?

Q And how old are you?

A Seventeen.

1 Q Sonya, I want to draw your attention to the afternoon
2 or early evening of June 9th of this year. Do you recall being
3 at Liberty Park?

4 A Yes.

5 Q And do you recall if you were with anybody or were
6 you by yourself?

7 A I was with two of my friends.

8 Q And what are their names?

9 A Crystal and Megan.

10 Q And -

11 THE COURT: I'm sorry, one more time.

12 THE WITNESS: Crystal and Megan.

13 THE COURT: Chris?

14 THE WITNESS: Crystal.

15 THE COURT: Crystal?

16 THE WITNESS: And Megan.

17 THE COURT: Okay, thank you.

18 Q (BY MS. REMAL) Why don't you try to move the
19 microphone just a little bit closer to you? We want to make
20 sure everyone can hear you.

21 Do you remember about what time you went to the park?

22 A It was probably after seven.

23 Q And when you got to the park, tell us what you did.

24 A Just walked around.

25 Q Was there a time when you started talking to some

1 other people in the park?

2 A Later on.

3 Q And who were these other people you started talking
4 to?

5 A A group of guys.

6 Q Did you know any of those guys before or was that the
7 first time you met them?

8 A The first time I had met them.

9 Q Can you remember how many guys there were?

10 A At least five.

11 Q And can you tell us whereabouts in Liberty Park that
12 happened?

13 A By the basketball courts.

14 Q And was there something there for you to sit on, or
15 did you just stand up?

16 A A table.

17 Q What kind of a table was it?

18 A Like a picnic table.

19 Q And do you recognize anybody here in the courtroom
20 today as being one of those guys that you talked to?

21 A Right there.

22 Q All right, can you [inaudible]-

23 THE COURT: For the record, Ms. Remal, let me just
24 indicate she's identified the defendant.

25 Q (BY MS. REMAL) Did you ever find out what this young

1 man's name was?

2 A Tracy.

3 Q And did you talk to him among the other guys that

4 were there?

5 A Not really.

6 Q So you didn't talk to him yourself?

7 A Huh-uh. [negative]

8 Q Ok. Is that a no? Can I ask you to say yes or no,

9 it makes it -

10 A No.

11 Q - a little bit more understandable. Thank you.

12 A Okay.

13 Q How long did you and your girlfriends talk to these

14 guys before something else happened?

15 A We were there probably 15, 20 minutes.

16 Q And was there a time while you were there by the

17 picnic table that some police officers came over to you?

18 A Yes.

19 Q And do you remember how many police officers there

20 were?

21 A Just two.

22 Q Have you seen any of those police officers here in

23 court today?

24 A Yes.

25 Q Can you see any of them here right now?

1 A Yeah.

2 Q Can you point to that police officer for us?

3 A Right there.

4 THE COURT: And for the record, it looks like

5 Detective Evans has been identified.

6 MS. REMAL: Thank you, Your Honor.

7 Q (BY MS. REMAL) Do you remember how the two police

8 officers were dressed that day at Liberty Park?

9 A I think they were in uniform.

10 Q Can you remember whether you saw how they got there,

11 to the park?

12 A [inaudible]

13 Q Did you notice if they were in a car?

14 A In a police car, yeah.

15 Q Do you remember if it was a regular police car that

16 says police on the side of it?

17 A Yeah.

18 Q What were the police doing the first time you became

19 aware that they were there?

20 A They had approached us and...

21 Q And what happened as they approached you?

22 A They had asked us some questions.

23 Q Now, when the police got over to where you were, were

24 all the same people there as you were talking to before?

25 A No.

1 Q What happened to some of them?

2 A They walked away, they left.

3 Q How many people were still there when the police

4 officers got there?

5 A I think like, five or six.

6 Q And were you and your two girlfriends among those

7 five or six?

8 A Yeah.

9 Q And who else was still there?

10 A Tracy and two other guys.

11 Q You said the police officers asked you some questions

12 when they got over to you.

13 A Yes.

14 Q Can you remember what questions they asked?

15 A They asked us if we had seen a drug deal or were

16 involved in one.

17 Q And what was the response to that question?

18 A We told them that we didn't know what they were

19 talking about.

20 Q And what happened after that?

21 A They told us that they had received a phone call and

22 indicated that there was a drug deal going on. And so...

23 Q And what happened after they told you that?

24 A They kind of looked around and they found the bag.

25 Q Now, at any point did the police officers ask you

1 your name or for identification?

2 A Yeah.

3 Q Can you remember when that happened?

4 A Afterwards.

5 Q And what did you and your friends do in response to

6 them asking for your names and identification?

7 A We gave them our names and our addresses and...

8 Q Did the police officers tell you what they were doing

9 with that information, why they asked that?

10 A Yes.

11 Q What did they say?

12 A They said that they wanted to know where we were in

13 case they had questions for us later.

14 Q Now, you said something about them finding the black

15 bag.

16 A Uh-huh (affirmative).

17 Q Describe to me what you remember about them finding

18 the black bag.

19 A The found the black bag and then they asked who it

20 belonged to.

21 Q Uh-huh (affirmative).

22 A And nobody seemed to know who it belonged to, so they

23 kind of opened it and searched through it.

24 Q Now, when they were asking who knew anything about

25 the black bag what were you and the other kids doing? Where

1 were you?

2 A We were just sitting on the table still.

3 Q Did the police officers, at first, ask you together

4 as a group about the black bag, or -

5 A Yes.

6 Q At any point did they ask you one by one about the

7 bag?

8 A Yes.

9 Q When did that happen?

10 A Nobody admitted to knowing anything about the bag so,

11 then they questioned us individually.

12 Q And describe to me how that happened. Where did they

13 - how did they get you individually?

14 A They pulled us off one by one and went quite a little

15 while away.

16 Q And then after you were done talking with the police

17 officer one by one then, then what happened?

18 A We just went back to the table.

19 Q Okay. Now, was there ever a time that the police

20 officers searched all of you?

21 A Yes.

22 Q When did that happen?

23 A After they had searched the black bag and they had

24 asked us who it belonged to.

25 Q Describe to me what you remember about being

1 searched.

2 A They just told us to empty our pockets and they

3 searched through me and my friends purses.

4 Q Now, was there a time when you tried to leave the

5 picnic table for some reason?

6 A We asked to use the restroom and to get a drink of

7 water.

8 Q And who we?

9 A Me and one of my friends.

10 Q And who were you asking for that permission from?

11 A Both of them.

12 Q And what did the police officers say?

13 A They told us that we weren't allowed to leave yet.

14 Q Now, did the police officers ever indicate to you

15 what was inside the bag, the black bag?

16 A They pulled it out in front of everyone.

17 Q And what - did you notice seeing something that was

18 sort of a vegetable material, a green leafy substance?

19 A Yeah.

20 Q And do you remember where they were when they pulled

21 it out?

22 A Where the officers were?

23 Q Uh-huh (affirmative).

24 A On the picnic table.

25 Q Did they actually take out that green leafy substance

1 and put it on the table?

2 A Yeah.

3 Q Now, do you remember the police officers ever saying
4 to you what they do if nobody said the bag was theirs?

5 A They said that we'd all get tickets for possession of
6 marijuana. And we'd probably all have to go to court for it.

7 Q Can you remember when it was that they said that?

8 A After they had questioned us and nobody still said
9 anything about the black bag.

10 Q Can you remember if the police officers said anything
11 about police dogs?

12 A They said that they were bringing in their dogs to
13 sniff out - to see if any of us had had anything to do with the
14 items in the bag.

15 Q And did you ever see any police dogs?

16 A They brought them, but they didn't - they let us go
17 before they took them out of the car.

18 Q Okay. Now, did you know that Tracy got arrested that
19 day?

20 A Yes.

21 Q Did you see that happen?

22 A Uh-huh (affirmative).

23 Q And after he got arrested was he taken away from
24 Liberty Park?

25 A Yes.

1 Q Did you see how that happened?

2 A They just drove him away.

3 Q Now, after Tracy was gone did you stay there at
4 Liberty Park or what did you do?

5 A We stood there till, like, 10, 11:00 that night.

6 Q Okay. And when you say we stayed there, who else
7 besides you?

8 A Just me and my two girlfriends.

9 Q Did anybody else that you had talked to previously
10 come and talk to you after Tracy was gone?

11 A Yes.

12 Q Who was that?

13 A One of the guys that had first called us over had
14 come back about an hour, hour and a half later.

15 Q An hour and a half later after what?

16 A After the police had left.

17 Q And did you ever find out that person's name?

18 A I think it was Clay.

19 Q And what makes you think it was Clay?

20 A Cause earlier that's the name that he had given me
21 and two of my friends.

22 Q Now, was Clay there when the police officers had been
23 there before?

24 A He was one of the guys that had left.

25 Q And when Clay came back did he notice that the black

1 bag was gone?

2 MS. WISSLER: Objection to what someone else noticed,
3 Your Honor. Not applying personal knowledge.

4 THE COURT: Sustained.

5 Q [BY MS. REMAL] Did Clay indicate whether or not he
6 noticed that the bag was gone?

7 MS. WISSLER: Objection, calls for hearsay.

8 THE COURT: Sustained.

9 MS. REMAL: Your Honor, I don't believe that it calls
10 for hearsay. At this point I'm asking her a yes or no.

11 THE COURT: All right. Rephrase - say it again, if
12 you would please.

13 Q (BY MS. REMAL) Was there something - and I want you
14 to just answer this yes or no. Was there something that Clay
15 said that indicated whether he noticed the bag was gone or not.

16 A Yes.

17 THE COURT: You can answer that yes or no.

18 Q (BY MS. REMAL) Did Clay - what was Clay's demeanor
19 when he came back?

20 A He was angry.

21 Q And did he say something about why he was angry?

22 THE COURT: That can be answered yes or no.

23 THE WITNESS: Yes.

24 Q (BY MS. REMAL) What did he say about why he was
25 angry?

1 MS. WISSLER: Objection, calls for hearsay.

2 MS. REMAL: Your Honor, I believe that it is an
3 excited utterance, it has to - it relates specifically to the
4 reason that he was angry, and I believe that that clearly fits
5 within the excited utterance.

6 (Whereupon a sidebar was held)

7 MS. REMAL: Thank you, Your Honor. I have no further
8 questions of Ms. Ortiz, but Ms. Wissler may have some
9 questions.

10 THE COURT: All right, cross examination?

11 CROSS EXAMINATION

12 BY MS. WISSLER:

13 Q Ms. Ortiz, you indicated that you were at the park -
14 at Liberty Park, on June 9th and you got there about seven
15 o'clock; is that right?

16 A Around there.

17 THE COURT: You need to answer -

18 THE WITNESS: Yes.

19 Q (BY MS. WISSLER) And you think you talked to these
20 three guys, or five guys that were there for how long, before
21 the police officers arrived?

22 A Fifteen to 20 minutes.

23 Q So what's your best recollection of what time it was
24 when the police officers arrived, if you know?

25 A I'm not sure.

1 Q Okay. And you - it's your testimony that you had not
2 met Mr. Allred before June 9th; is that right?

3 A Yes.

4 Q And have you talked to him since then?

5 A No.

6 Q You indicated that at some point during the incident
7 you saw a police dog or some police dogs; is that right?

8 A Yes.

9 Q Do you remember how many dogs you saw?

10 A I'm pretty sure it was just one.

11 Q Do you remember what kind of dog that was or do you
12 know what kind of dog it was?

13 A I have no idea.

14 Q How far away were you when you saw the dog?

15 A Like, 10 feet.

16 Q Okay. And you - but you don't know what kind of dog
17 it is -

18 A Huh-uh. [negative]

19 Q - was.

20 A No.

21 Q You indicated to Ms. Remal just a while ago that the
22 officers told you that if you didn't tell them whose bag it was
23 you were all going to get tickets for possession of marijuana;
24 is that what you said?

25 A Yeah.

1 Q Do you recall testifying in a motion - or in a
2 previous hearing in this case on September 1st?
3 A Yes.
4 Q Was that - that was in this courtroom; is that
5 right?
6 A Yes.
7 Q And that was in front of Judge Lewis?
8 A Yes.
9 Q Okay. Do you remember Ms. Remal asking you some
10 questions along these same lines that she asked you questions
11 about today?
12 A Yes.
13 Q And you didn't say anything on September 1st about
14 the officers telling you that you were going to get a ticket,
15 did you?
16 A I think I did.
17 Q Okay, you think that you testified on September 1st
18 that they officers told you that you were going to get a
19 ticket?
20 A Yeah.
21 Q Okay. Do you also recall testifying on September 1st
22 about the issue of the conversation involving the dog?
23 A Yeah.
24 Q Between the two officers; is that right?
25 A Yes.

1 Q Did the officers ever say anything to you - to you
2 specifically about the dog?

3 A No.

4 Q Okay. And you testified again today about the
5 conversation about the dog; is that right?

6 A Yes.

7 Q Okay. And it's your testimony, is it not, that the
8 officers told you that they were going to bring the dog in, and
9 that the dog would be able to sense it if you had any
10 involvement in the bag; is that correct?

11 A Yes.

12 MS. WISSLER: Thank you, I have not other questions,
13 Your Honor.

14 THE COURT: Ms. Remal, anything further?

15 MS. REMAL: Nothing further of this witness.

16 THE COURT: Let me get counsel to approach again.

17 [Whereupon a sidebar was held.]

18 REDIRECT EXAMINATION

19 BY MS. REMAL:

20 Q Sonya, I'm going to ask you just a few more
21 questions. After Tracy had been taken away from Liberty Park,
22 you indicated that someone named Clay came back over to where
23 you and your girlfriends were.

24 A Yes.

25 Q Can you tell us what you observed about Clay that

1 made you think he was angry?

2 A He was yelling and swearing, and he was just pretty
3 much mad.

4 Q And did his yelling and swearing and being mad relate
5 to the black bag?

6 A Yes.

7 MS. REMAL: Your Honor, may I approach the witness?

8 THE COURT: Yeah.

9 Q (BY MS. REMAL) Let me show you what's previously
10 been admitted as States number 1, and ask you if that is
11 recognizable to you at all.

12 A Yes.

13 Q What does that look like to you?

14 A That looks like the black bag that was there.

15 MS. REMAL: Thank you, Your Honor. I don't have any
16 further questions [inaudible].

17 THE COURT: All right. Ms. Wissler, did you have
18 anything further?

19 MS. WISSLER: Yes, Your Honor. Just briefly.

20 RE CROSS EXAMINATION

21 BY MS. WISSLER:

22 Q Ms. Ortiz, had you ever met this Clay before June
23 9th?

24 A No.

25 Q Had you ever talked with him?

1 A No.

2 Q You don't know his last name; is that right?

3 A Huh-uh [negative].

4 Q Don't know where he lives?

5 A Nope.

6 Q Don't know anything about him other than he said his
7 name was Clay; is that right?

8 A Right.

9 MS. WISSLER: Okay. Thanks, I have no further
10 questions.

11 THE COURT: All right. I'm going to ask the jury to
12 step out again for a moment, and I hope the donuts are there.
13 And please don't discuss the case. It'll just be about five
14 minutes.

15 [Whereupon the jury left the courtroom]

16 THE COURT: Ms. Ortiz, you may be seated. Did you
17 testify at the preliminary hearing?

18 THE WITNESS: What's [inaudible].

19 THE COURT: That means another courtroom where
20 another judge was present and you were asked questions. Did
21 you testify in such a courtroom?

22 THE WITNESS: No.

23 THE COURT: All right, so the first time you ever
24 testified or talked under oath was in the hearing before me;
25 is that right?

1 THE WITNESS: Yes.

2 THE COURT: Why didn't you mention Clay then?

3 THE WITNESS: In my memory I think I mentioned him

4 [inaudible].

5 THE COURT: Oh, no. You did not.

6 MS. REMAL: Your Honor, just -

7 THE WITNESS: I -

8 MS. REMAL: To clarify, I believe that she did

9 mention Clay as one of the people she met. I don't believe

10 that she testified and wasn't asked about this incident later

11 on.

12 THE COURT: All right. Perhaps you mentioned the

13 name Clay. I do not remember that. And I took notes because I

14 had to rule on a motion.

15 THE WITNESS: Okay.

16 THE COURT: Why didn't you mention this alleged

17 statement that Clay made?

18 THE WITNESS: I wasn't asked.

19 THE COURT: Had anyone told you not to discuss it?

20 THE WITNESS: No.

21 THE COURT: Didn't you think that was an important

22 thing to get out?

23 THE WITNESS: I told the detective or investigator

24 that had come to my house.

25 THE COURT: What detective that had come to your

1 house?

2 THE WITNESS: He's sitting over there.

3 MS. REMAL: Mr. Couch had interviewed her, Your
4 Honor, when we found her pursuant to notes that we got from
5 Officer Evans.

6 THE COURT: But you didn't tell the two detectives
7 that were at the park.

8 THE WITNESS: Well, they had left before Clay came
9 back.

10 THE COURT: And you didn't call on the phone to the
11 police headquarters and ask for them by name and tell them?

12 THE WITNESS: I didn't know their names. They said
13 that they'd be in touch with us.

14 THE COURT: And you didn't tell Clay to contact the
15 police department?

16 THE WITNESS: No.

17 THE COURT: Is that a no?

18 THE WITNESS: Yes.

19 THE COURT: You may stand down.

20 I'm going to let you make a record of your motion and
21 let Ms. Wissler respond. You know, one of the things that I
22 find extraordinarily difficult to accept, to understand and to
23 deal with is surprises in the courtroom. The law in real
24 trials are not meant to be like Parry Mason, where pieces of
25 evidence or newly discovered crap - or crap's the wrong word -

1 data, is pulled out at the last minute taking everybody by
2 surprise.

3 Obviously, if the State did that there would be a
4 motion for a mistrial, and it would be considered evidence that
5 was essential and the failure to provide the same would be
6 considered unethical, etc, etc.

7 Different rules apply to the defense, I'm well aware
8 of that. And I'm also well aware that Ms. Remal would never do
9 anything unethical. However, I have some concerns that letting
10 in information that the State has not had an opportunity to
11 deal with or prepare for, certainly it raises the question of
12 why. If Detective Couch was able to get this information, it
13 was not available to the detective in this case, I guess the
14 answer is that they were never aware of Clay because the
15 defendant didn't tell them, and Sonya didn't tell them. And he
16 was not present when they were at the park. But it seems to me
17 critical enough information that if it had been given to the
18 State t,hings might have been handled differently in a lot of
19 ways. Isn't that true Ms. Wissler?

20 MS. WISSLER: Certainly.

21 THE COURT: Do you want to talk about what you
22 understand the rule on site of evidence to be Ms. Remal?

23 MS. REMAL: Yes, I do. And let me respond, if I
24 might, to what The Court just said, for the record. And that
25 is, it is certainly my understanding that the rules are

1 different for the defense than they are for the State. The
2 State did not do a motion for discovery asking for information
3 from the Defense. And frankly, had they done so, I would have
4 responded with an argument and memorandum that Mr. Allred has a
5 right against self incrimination, which is broader than just
6 him not being required to answer questions. And that I would
7 have felt that it's not constitutionally appropriate for a
8 Defendant to be required to give evidence to the State.

9 The way we discovered Ms. Ortiz at all was that at
10 the preliminary hearing Officer Evans testified that although
11 he didn't have the names of these individuals, that he spoke
12 to, in his report - in his police report - that he believed he
13 had notes somewhere at the police department which contained
14 the names of the individual. And in fact he did, in pursuance
15 to subpoena I obtained those. I then asked Mr. Couch to
16 interview the people if he could find them. Through drivers
17 license checks and obtaining Ms. Ortiz's address, that's how he
18 was able to obtain the information about how to contact her
19 and, in fact, did contact her.

20 I did not ask her about Clay and his exclamation
21 about the bag at the motion to suppress because it wasn't
22 relevant to that. And she -

23 THE COURT: Oh, I think it was highly relevant.

24 MS. REMAL: Well, in my view it's not relevant, Your
25 Honor, and in my view it is -

1 THE COURT: It might have resulted in a totally
2 different ruling. If your argument is that someone is being
3 coerced, and you've got someone who's going to say that another
4 individual said in an angry tone, that was my bag, that's
5 relevant to a motion to suppress, highly relevant.

6 MS. REMAL: Well, I apologize -

7 THE COURT: Well, no -

8 MS. REMAL: - for not relaying that because it might
9 be with -

10 THE COURT: I don't think it's -

11 MS. REMAL: It wasn't.

12 THE COURT: Apology material. I think it's tactical
13 and your aloud to proceed in a manner that you deem
14 appropriate. I have absolutely no concerns about your ethics.
15 Never have had. You're an excellent lawyer, and I think if you
16 choose to handle things tactically in a certain manner that's
17 an appropriate choice.

18 My concern is, given that choice and the fact that
19 obviously the information was available, the State could have
20 asked for it. But if they'd asked for it in written discovery,
21 as you point out, it would have been pointless. And the only
22 other way they could have done it is to re-interview Sonya,
23 which, in hindsight, should have been done but would be hard to
24 predict. So what we've got is a situation where we have a
25 person with a first name and no last name, who may or may not

1 exist. We don't know because we haven't ever seen this
2 individual. You don't have an address for him, a phone number?

3 MS. REMAL: No, we have no more information other
4 than what Ms. Ortiz testified to.

5 THE COURT: So, we're not looking at a live witness
6 who can be put before the jury, and cross examined. So the
7 State has not right to cross examination. There is no
8 impediment to his testifying, that we're aware of, except that
9 his last name hasn't been given. And I suppose if he's a
10 friend of the defendant the defendant would know his last name.
11 And if the defendant -

12 MS. REMAL: Your Honor -

13 THE COURT: Just a minute, let me finish my thought.
14 If the defendant is going to accept the responsibility
15 argumendo, for somebody else's property, that puts him in a
16 position where he's going to be arrested I think one would have
17 to assume that would be a friend. You don't do it for a
18 stranger. And that being the case, my guess is, either the
19 person doesn't exist or the person does exist and the defendant
20 knows his last name. But the last name has not been provided.
21 And the person has not been brought in. So the State, it seems
22 to me, is being deprived of the right to confirm him, to cross
23 examine him, and that concerns me. And I'm going to listen to
24 what you have to say about spontaneous utterance, but the
25 thread that runs all the way through hearsay and all the

1 hearsay rules, is inherent reliability.

2 The reason we allow spontaneous utterances, under
3 some circumstances, when they're truly spontaneous, is because
4 there is an inherent reliability. If someone's hand is cut and
5 they see blood dripping and they say, Oh my god, you must have
6 cut me. That's because it's inherently reliable. Because it
7 occurs without one thinking about it, it's spontaneous based
8 upon some extreme emotion or some physical sensation or
9 whatever.

10 The other exceptions to the hearsay rule are also
11 allowed because there's an inherent reliability. In this case
12 where's the inherent reliability? We don't know the last name
13 of this individual, the information has not been provided to
14 the State. We still have no data about why this man isn't
15 here, or where he is, or who he is. And the only thing we've
16 got is a 17 year old girl who doesn't know his last name, who's
17 going to make some statement about the bag, that apparently he
18 made. And I don't see any reliability in that. There's
19 nothing to support it. Nothing to corroborate it. The
20 defendant, in his statement to the police, never eluded to any
21 Clay, that I'm aware of.

22 Did he, officer?

23 OFFICER COUCH: No.

24 THE COURT: Was he asked any questions, Officer,
25 about whether or not the bag belonged to anyone else?

1 OFFICER COUCH: No.

2 THE COURT: But he was asked to whom the bag
3 belonged?

4 OFFICER COUCH: Yes.

5 THE COURT: All right, Ms. Remal, I'm happy to hear
6 your argument.

7 MS. REMAL: Your Honor, of course I'm - as I've
8 indicated earlier, relying on Rule 803 subsection 2 which is
9 entitled excited uttering. In Rule 803 at the very beginning
10 before siting all of the subsections - well, at the very top it
11 says, Rule 803 hearsay exceptions, availability of declaring
12 immaterial. There is a separate rule which talks about
13 declarant being unavailable. With 803, it doesn't matter
14 whether the declarant is available or not available. And so,
15 it's not required that the declarant be available in order to
16 be cross examined by the party of [inaudible].

17 In my view - and let me, for the record, although we
18 indicated that this is the bench in case this wasn't loud
19 enough for the record to hear, it - I anticipate that if Ms.
20 Ortiz were aloud to be asked, what did Clay say, he response
21 would be "The bag was mine. That stuff was mine." And in my
22 view, that fits exactly into the dictates of excited utterance,
23 which states, a statement relating to a startling event or
24 condition made while the declarant was under the stress of
25 excitement caused by the event or the condition. The event or

1 the condition in this case is the black bag being gone. And
2 the statement about the black bag is immediately following that
3 and relates to the condition of the black bag being gone, and
4 the statement is, the black bag was mine.

5 THE COURT: Well, first of all, can you refresh me?
6 I don't recall her saying when it was in relation to when the
7 defendant had left. But my understanding is she stayed till 11
8 p.m. or midnight and that this person came back some time
9 later.

10 MS. REMAL: My understanding is that it was about an
11 hour or an hour and half later.

12 THE COURT: All right [inaudible].

13 MS. REMAL: But the event that I'm talking about is
14 Clays discovery that the bag was gone.

15 THE COURT: Uh-huh (affirmative).

16 MS. REMAL: Which happened immediately prior to his
17 statement claiming ownership of the bag. And so in my view it
18 fits precisely within excited utterance and the declarant
19 doesn't need to be available. And as I previously indicated,
20 we have no more further information about Clay.

21 THE COURT: I don't think the declarant needs to be
22 available either. I just think that that is one of the factors
23 that I can consider. It's not a definitive factor, but it's
24 one of many in determining how reliable this is. The fact that
25 there was no last name. The fact that he's not here to

1 testify. The fact that we have no other information about him,
2 goes to the issue, it seems to me, of whether or not it's
3 inherently reliable and credible information which underlines,
4 as I said before, all the hearsay exceptions.

5 Was there anything else you wanted to say on that?

6 MS. REMAL: Just to respond to that, Your Honor.
7 Respectfully, I disagree with the Court that you need to
8 balance those factors. My reading of Rule 803 is that you look
9 at the rule, you determine that parameters of the rule and if
10 the statement fits within one the exceptions then it's
11 admissible without requiring the Court to look to other factors
12 to determine it's reliability. That the fact, in my view, that
13 it fits within the exception means that our legislature, in
14 adopting this rule of evidence, has determined already that
15 that's sufficient reliability for it to be admissible.

16 THE COURT: And my understanding, clearly, is that
17 the hearsay rule, in all of it's aspects, is predicated upon
18 inherent reliability. Each of the exceptions has that as the
19 basis. There is, in fact, one catch-all exception that talks
20 about all of the indicia showing inherent reliability. But all
21 of them, even the ones that don't use that language require
22 that that be part of it. And we don't even have a last name.

23 Ms. Wissler, would you like to respond?

24 MS. WISSLER: Just briefly, Your Honor. As first of
25 all, I think there's a problem foundationally speaking, if you

1 will. Ms. Ortiz testified today that she had never met this
2 Clay person before. She's not even sure that that's his real
3 name. She just knows that's the name that he gave her. We
4 don't know his last name obviously.

5 THE COURT: Ms. Ortiz, will you step out please?
6 Perhaps Detective Couch or someone else can step out with you.
7 Don't want you to leave.

8 Excuse me, go ahead.

9 MS. WISSLER: That's okay. We just know that's the
10 name that he gave her. We don't know if he was being truthful
11 or what. We don't know his last name, we don't know anything
12 about him.

13 We also don't know whether any of her observations
14 about him were accurate. She had never met this person before.
15 She has not spoken to him since. So her analysis of his state
16 of mind may be completely wrong. She's not in a position to
17 give an opinion as to whether he was angry or happy. She can
18 say he was yelling and swearing, and she did say that.

19 But for - to predicate an exception to hearsay
20 requirement - or a hearsay rule, on her observations of someone
21 that she doesn't even know, seems to me to be ludicrous. I
22 mean, it seems to me that the rule requires that there be some
23 objective indication that this person really truly was under
24 this emotional strain or under [inaudible]-

25 THE COURT: You're saying that in order to assess the

1 emotional stress or strain or what a persons demeanor was,
2 you'd have to have seen them on more than one occasion to see
3 what was normal for them. Is that -

4 MS. WISSLER: Exactly, we have no base line. We
5 don't know what this person behaves like normally. We don't
6 know what his natural demeanor is. We don't know whether, like
7 I said, whether her assessment of his state of mind is even
8 accurate. And so to predicate this extremely unreliable
9 hearsay statement upon her observations of a person she had
10 never met before seems to me to add additional unreliability to
11 her whole statement.

12 THE COURT: Ms. Remal, you may respond.

13 MS. REMAL: Your Honor, my response is that I think,
14 is one of the common - common aspects of human nature that when
15 people are angry, the behavior of yelling and cursing often
16 accompanies it. It doesn't in every situation, there are some
17 people who, when they're angry sort of a slow burn and they
18 become quieter. But I think that anger is most commonly
19 displayed by somebody yelling and screaming. And so the fact
20 that you may not have met someone before and know what they're
21 normally like, that it's very appropriate to conclude that the
22 person is angry because of that kind of behavior, yelling and
23 screaming.

24 THE COURT: Well, and I'm not sure that the emotion
25 of anger is what was contemplated by spontaneous utterance

1 either. I think, obviously, it's talking about strong emotion.
2 But anger can be something that is manipulated. It's not like
3 spontaneous exclamation of some kind. And we're talking about
4 an hour and a half after the fact. And I think it's very
5 creative that you're saying that the action was his discovery
6 of the missing bag. But the action, in fact, was what had
7 occurred around the table, and the defendant being arrested and
8 the defendant taking responsibility for the bag, and that
9 occurred an hour and a half before. Where was this person for
10 the hour and a half that he was gone?

11 MS. REMAL: I have no more information than the Court
12 now does.

13 THE COURT: There is no closeness to the event,
14 really. And I can't find that there is a spontaneity - it
15 sounds like he took an hour and a half to come up with some
16 kind of - or at least potentially, he took an hour and a half
17 to think about this. And that's why timing of spontaneous
18 utterance is so important, and had worked out some kind of
19 statement.

20 Also, discovery of the missing bag is not necessarily
21 what I would call a startling event. I guess we'd need to do
22 research, which we haven't done. But generally missing
23 property is not considered a startling event. It's something
24 of more consequence.

25 I am going to, based upon the totality, disallow her

1 statement about this individual and his alleged statement
2 because I do not believe it is inherently reliable. Number
3 one, Clay's full name is not even given. There has been no
4 attempt to find Clay. And spontaneous utterances, despite the
5 fact that hearsay says the Rule 803 says very clearly,
6 unavailability is not essential, what one tries to do is put on
7 the best evidence. The witness who made the statement. Where
8 is Clay? We don't even have a last name. No effort has,
9 apparently, been made to find him. We have a delay of an hour
10 and a half between the excitement - the excitement being the
11 arrest of the defendant, the acknowledgment by the defendant
12 that it was his bag. The running away by this other individual
13 if you believe he existed. And that's not close enough in
14 time. I don't believe that his discovery of his missing bag,
15 if it was his bag, is what's relevant in terms of determining
16 the time factor.

17 If it was his bag, the other question that one would
18 ask if he were available for cross examination is, why didn't
19 you take it with you?

20 And I suppose, since I have already ruled, that Ms.
21 Wissler may not go into, in any definitive way, the contents of
22 the bag, and the defendant's statements about the contents of
23 the bag, other than the marijuana, it would be extremely
24 inequitable for me then to allow this witness, who had never
25 before in the hearings she appeared at, render statements to

1 law enforcement, mention this other individual. It would be
2 extremely inequitable for me to say, no you can't talk about
3 what the defendant said was in the bag indicating his
4 familiarity with the bag and his ownership. All you can do is
5 go into what this other person who has no name said.

6 If we had a last name, if we knew that this was a
7 real person. If, for example, this were a friend of the
8 defendant, who had left the jurisdiction and couldn't be found,
9 I'd be more inclined to let it in because we have inherent
10 reliability, or at least arguably that would be present in the
11 friendship between the two. And the fact that we have a full
12 name and it's not just somebody pulled out of the air. But we
13 have nothing. We don't know if this person existed; who they
14 were, where they got their information, and the very important
15 rights to confront and cross examine, which are not limited to
16 the defendant. But the State has a right to see witnesses that
17 are given testimony. That's the reason why hearsay is
18 precluded. And to cross examine is precluded. And this is an
19 extremely important thing, and it's coming out - I shouldn't
20 say thing, and extremely important piece of information - and
21 it's coming out at the last minute. Meaning that it - the
22 State doesn't have an opportunity to rebut it, or in any way to
23 deal with it. And all of those things are of concern to me.

24 So I find it is not a situation where we have a true
25 startling event. If we do, the startling event is the removal

1 of the bag and the arrest of the defendant. And that was not
2 proximate in time to this alleged statement made by this
3 individual, Clay. We do not have the standard indicia of
4 reliability. We don't even have a full name for the
5 individual. And we don't really have an indication that it was
6 a spontaneous utterance. Part of that is the length of time
7 that has passed, an hour and a half. And part of it is that
8 one can profess anger and scream and yell and that is not
9 necessarily a spontaneous emotional outburst. It can be
10 premeditated and planned.

11 And if this information had been provided to the
12 State timely, I might be willing to bend over backwards to
13 assist the defense in using this. That is to say, in looking
14 more closely at allowing the State this opportunity. But
15 there's been no chance for the State to have any kind of parity
16 here. And as I say, I've even made a ruling that the content
17 of the bag, which the defendant was very familiar with, and
18 that's obviously very important to someone else's claiming to
19 own it. I made a ruling that that could not come in.

20 So given the totality I'm not inclined to find - in
21 fact, I find specifically that it is not a classic excited
22 utterance. And if it is, then it fails to come in because of
23 its lack of reliability. Specifically that we don't even have
24 a last name for the alleged declarant. And there is no other
25 indicia of reliability, specifically the defendant never said,

1 talked to Clay, or somebody else may own this that you ought to
2 talk to, or anything giving an indication that it was not his.

3 On the contrary, he not only accepted responsibility
4 for ownership and what the Court has found to be a non-coercive
5 setting, but he explained why he had it, giving and
6 explanation. And while the jury will never know this, he was
7 very clear about what else was in the bag.

8 Now, I have no idea what is in Ms. Wissler's
9 briefcase on the bench. No idea because it doesn't belong to
10 me and I have never looked at it. But if it were mine, I'd
11 know exactly what's in it.

12 Do you want to speak with your client Ms. Remal -

13 MS. REMAL: Yes, thank you.

14 THE COURT: -and then say anything you wish to?

15 Okay, I don't want to circumvent giving everybody the
16 appropriate time they need. Ms. Remal, if you need more, you
17 may have it. You can have as much time as you want. But if
18 you're ready then I'd like to move forward.

19 MS. REMAL: I think we are ready, Your Honor.

20 THE COURT: Do you...

21 MS. REMAL: Mr. Allred is just reminding me of a
22 point that I think is probably obvious but none of us mentioned
23 which is, ~~he~~ didn't know the name of Clay, he didn't know Clay,
24 he couldn't have given us information about how to find him.
25 And even if he did, we all know that realistically it's very

1 difficult to get a person to come in as a witness and on the
2 witness stand admit that they've committed a crime, because
3 realistically people are not very inclined to do that.

4 THE COURT: Realistically, why would someone accept
5 responsibility for ownership of the bag containing controlled
6 substances if the person who owns the thing is not even a
7 friend or someone whose last name you know.

8 Where does the sense of responsibility, or the sense
9 of a desire to help come from in that scenario?

10 MS. REMAL: Your Honor, that's going to be the
11 subject of my closing argument.

12 THE COURT: Okay. All right. Let's go ahead and
13 bring the jury - wait just a minute.

14 MS. REMAL: Your Honor...

15 THE COURT: Just a minute Chris. Where are the
16 instructions? See how close we are on that. Because you're
17 not going to call a rebuttal witness, are you?

18 MS. WISSLER: Was that a question or a statement?

19 THE COURT: Well, it sounded like a statement but
20 it's a question.

21 MS. WISSLER: I'm not.

22 THE COURT: You may if you wish to.

23 MS. WISSLER: No, I'm not.

24 THE COURT: Ms. Remal?

25 MS. REMAL: I'm sorry, Your Honor, [inaudible] cover